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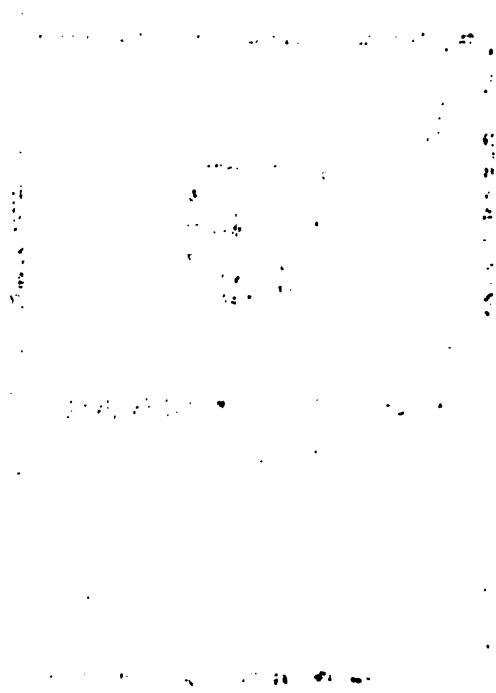
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Sec. 17

23

REPORTS OF CASES  
ARGUED AND ADJUDGED IN  
THE SUPREME COURT  
OF THE  
DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,  
FROM MARCH, 1885, TO APRIL, 1886.

---

REPORTED BY  
FRANKLIN H. MACKEY.

VOL. IV.

BALTIMORE:  
M. CURLANDER,  
LAW BOOKSELLER, PUBLISHER AND IMPORTER.  
1886.

*Rec. June 21, 1886*

# OFFICERS

## OF THE

### Supreme Court of the District of Columbia.

---

DAVID K. CARTTER - - - - -	CHIEF JUSTICE.
ANDREW WYLIE* - - - - -	} ASSOCIATE JUSTICES.
ARTHUR MAC ARTHUR - - - - -	
ALEXANDER B. HAGNER - - - - -	
WALTER S. COX - - - - -	
CHARLES P. JAMES - - - - -	
WILLIAM M. MERRICK† - - - - -	

A. S. WORTHINGTON - - - - - U. S. DISTRICT ATTORNEY.

RETURN J. MEIGS - - - - -	CLERK.
JAMES G. PAYNE - - - - -	AUDITOR.
CLAYTON McMICHAEL‡ - - - - -	} U. S. MARSHAL.
ALBERT A. WILSON§ - - - - -	
H. J. RAMSDELL - - - - -	REGISTER OF WILLS.

\* Resigned May 1, 1885.

† Appointed May 4, 1885.

‡ Resigned December 4, 1885.

§ Appointed December 5, 1885.



## MEMORANDUM.

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### RESIGNATION OF MR. JUSTICE WYLIE.

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At a meeting of the members of the Bar called to take action in respect of the resignation of the Hon. Andrew Wylie, as a justice of this court, the following resolutions were passed.

WHEREAS, the Honorable Andrew Wylie has, by resignation, retired from his position as one of the Justices of the Supreme Court of the District of Columbia;

AND, WHEREAS, we, as members of the Bar of that Court, cannot permit an action fraught with so much interest to this Bench and Bar, to pass without expressing our feelings on the occasion:

*Be it, therefore, Resolved*, That we, as members of the Bar of the Supreme Court of the District of Columbia, hereby express our high respect and esteem for the Hon. Andrew Wylie, both as a man and a judge; our thanks to him for the faithful and able manner in which he has, for twenty-two years past, administered the law and fulfilled his duties on the Bench. That he carries with him, in his retirement, our honor and regard, to which his character, abilities and services have so well entitled him, and our best wishes and hopes that he may crown his life of labor with the prolonged age so justly his due.

*Resolved*, That a copy of these resolutions be presented to the Hon. Andrew Wylie by a committee of this Bar, and also to the Court in General Term, with the request that the same may be spread upon its minutes.

Whereupon, the Court orders that the said resolutions be spread upon its minutes; which is done accordingly.

MAY 8, 1885.



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## IN MEMORIAM.

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Haud igitur leti præclus est janua cælo  
Nec soli terræque neque altis æquoris undis :  
Sed patet immani et vasto respectat hiatu.

LUCRETIVS.

Since the publication of the third volume of these reports the following resolutions of the Bar of this District have been passed at special meetings, and by order of court have been spread upon the minutes :

### **ROBERT K. ELLIOT.**

Died March 11, 1885.

---

*Resolved*, That the members of the Bar Association have received with a sense of profound regret the intelligence of the sudden death of Robert K. Elliot, one of its members, whose record as a lawyer and citizen placed him in the very foremost ranks of the honorable profession of which he was a member.

*Resolved*, That the memory of our deceased brother deserves to be cherished with the utmost respect and esteem by the members of the Bar Association, as that of a lawyer who, by untiring devotion to the study of the law, earnest and faithful attention to the trusts confided to him, unflinching industry and strict integrity, had won for himself a place among the very highest in its ranks, and who in all relations of life was a most eminent and worthy citizen.

*Resolved*, That the President of the Bar Association be requested to present these resolutions to the Court in General Term, with a request that they be entered upon its minutes.

*Resolved*, That a copy of these resolutions be transmitted to the family of the deceased, with the expression of sympathy and condolence of the members of this Association.

APRIL 6, 1885.

**RICHARD T. MERRICK.**

Died June 23, 1885.

*Resolved*, That the members of the Bar of the District of Columbia have heard with sincere sorrow of the death of their professional brother, Richard T. Merrick, who, for many years was an eminent leader of this Bar, and held high rank as a practitioner in the Supreme Court of the United States.

*Resolved*, That we lament the bereavement which this profession has sustained in the death of Mr. Merrick, who has left upon our hearts and memories the recollections of an accomplished lawyer, of a brilliant advocate, of a generous and faithful friend, and of an earnest and faithful man.

*Resolved*, That the members of this Bar will pay to his memory the respect of attending his funeral in a body.

*Resolved*, That the chairman be requested to present these resolutions to the Supreme Court of the District of Columbia at its session in General Term.

*Resolved*, That the chairman convey to the family of Mr. Merrick a copy of these resolutions, with the expression of the profound sympathy of the Bar.

JULY 1, 1885.

**JOHN F. HANNA.**

Died October 31, 1885.

WHEREAS, In the mysterious dispensation of Divine Providence, we have been bereft, by a sudden and appalling accident, of our professional brother and tried friend, John F. Hanna:

*Resolved*, That in his death, the members of the bar deplore the loss of one who, as companion and friend, ever exhibited the noblest attributes of a refined and Christian gentleman; who, as a lawyer, stricken down in the hour of his greatest promise, was endowed with every qualification for future usefulness in his profession, and whose extraordinary devotion to the discharge of his duties as a son and brother,



was at once the index of his amiability and virtues and the assurance of his fitness for future happiness.

*Resolved*, That we will cherish an affectionate remembrance of his many excellent qualities and professional worth.

*Resolved*, That the chairman and secretary of this meeting transmit a copy of these resolutions to the family of the deceased, and assure them of our sincere condolence in the bereavement which they have sustained.

*Resolved*, That the members of the bar attend the funeral in a body

*Resolved*, That the committee, through its chairman, present these resolutions to the court in General Term, with a request that they be entered upon the minutes.

Nov. 2, 1885.



## TABLE OF CASES.

---

	PAGE
Atwood v. Latney . . . . .	186
Bank v. Hume . . . . .	90
Baker v. Ramsburg . . . . .	1
Baptist Church v. Railroad Company . . . . .	43
Barnard v. Insurance Company . . . . .	63
Bayard, De la Rua v. . . . .	310
Beckley v. Market Company . . . . .	163
Beveridge, Horsey v. . . . .	291
 Chandler, Granite Company v. . . . .	 32
Chappell, Shoemaker v. . . . .	413
Coffin, Smoot v . . . . .	407
Commissioner of Patents, Hill v. . . . .	266
Connick v. Morrison . . . . .	497
Costello v. Knight . . . . .	65
Cotharin v. Davis . . . . .	146
Cranford, Schillinger v. . . . .	450
 Davis, Cotharin v. . . . .	 146
Davis, Jackson v. . . . .	194
De la Rua v. Bayard . . . . .	310
Diggins v. Doherty . . . . .	172
District, Eckloff v. . . . .	572
District, Koonas v. . . . .	339
District, Market Company, v. . . . .	416
District, McCormick v. . . . .	396
District v. Oyster . . . . .	285
District v. Railroad Company . . . . .	217
District, Strong v. . . . .	53, 242
District v. Waggaman . . . . .	321
Doherty, Diggins v. . . . .	172
Dunn v. Murt . . . . .	289

	PAGE
Durham, State of Mississippi v. . . . .	235
Eckloff v. The District . . . . .	572
Endowment Association v. Wood . . . . .	19
Evans, United States v. . . . .	281
Fisher v. Lighthall . . . . .	82
Flannery v. Railroad Company . . . . .	111
Gibbons v. Mahon . . . . .	130
Giddings v. Squier . . . . .	49
Goldsmith v. Gross . . . . .	126
Granite Company v. Chandler . . . . .	32
Grant, Meloy v. . . . .	486
Gross, Goldsmith v. . . . .	126
Hamilton, United States v. . . . .	446
Hartley, Meads v. . . . .	391
Hellen v. Railroad Company . . . . .	519
Henry, Rich v. . . . .	155
Hewett v. Lewis . . . . .	10
Hewett v. Telegraph Company . . . . .	424
Hill v. Commissioner of Patents . . . . .	266
Hitz, Keyser v. . . . .	179
Hogan, Mercer v. . . . .	520
Horsey v. Beveridge . . . . .	291
Housam v. Kunecke . . . . .	297
Hume, Bank v. . . . .	90
Hunter, Pike v. . . . .	531
In re Wales . . . . .	38
Insurance Co., Barnard v. . . . .	63
Jackson v. Davis . . . . .	194
James, Morrow v. . . . .	59
Jones v. Railroad Company . . . . .	106
Keyser v. Hitz . . . . .	179
Koones v. The District . . . . .	339
Knight, Costello v. . . . .	65
Kubel, Marr v. . . . .	577

	PAGE
Kunecke, Housam v. . . . .	297
Lang, U. S., use of, v. May . . . . .	4
Latney, Atwood v. . . . .	186
Lee, United States v. . . . .	489
Lewis, Hewett v. . . . .	10
Lighthall, Fisher v. . . . .	82
Mahon, Gibbons v. . . . .	130
Main, Marks v. . . . .	559
Market Company, Beckley v. . . . .	163
Market Company, The District v. . . . .	416
Market Company, Steubner v. . . . .	301
Marks v. Main . . . . .	559
Marr v. Kubel . . . . .	577
May, U. S., use of Lang, v. . . . .	4
McCormick v. The District . . . . .	396
McGill v. The District . . . . .	70
Meads v. Hartley . . . . .	391
Meloy v. Grant . . . . .	486
Mercer v. Hogan . . . . .	520
Mississippi, State of v. Durham . . . . .	235
Morrison, Connick v. . . . .	497
Morrow v. James . . . . .	59
Murt, Dunn v. . . . .	289
Nardello, United States v. . . . .	503
Oyster, The District v. . . . .	285
Patents, Commissioner of, Hill v. . . . .	266
Pepper v. Shepherd . . . . .	269
Pike v. Hunter . . . . .	531
Prott, Wallace v. . . . .	259
Quill v. Wolfe . . . . .	188
Railroad Company, Baptist Church v. . . . .	43
Railroad Company, Flannery v. . . . .	111
Railroad Company, Hellen v. . . . .	519
Railroad Company, Jones v. . . . .	106
Railroad Company, Scott v. . . . .	152

	PAGE
Railroad Company <i>v.</i> Spencer . . . . .	138
Railroad Company, The District <i>v.</i> . . . . .	214
Ramsburg, Baker <i>v.</i> . . . . .	1
Rich <i>v.</i> Henry .. . . .	155
Ritchie, Thaw <i>v.</i> . . . . .	347
Schillinger <i>v.</i> Cranford . . . . .	450
Scott <i>v.</i> Railroad Company . . . . .	152
Shepherd, Pepper <i>v.</i> . . . . .	269
Shoemaker <i>v.</i> Chappell . . . . .	413
Smith <i>v.</i> Smith . . . . .	255
Smith <i>v.</i> Whitney . . . . .	535
Smoot <i>v.</i> Coffin . . . . .	407
Spencer <i>v.</i> Railroad Company . . . . .	138
Squier, Giddings <i>v.</i> . . . . .	49
State of Mississippi <i>v.</i> Durham . . . . .	235
Steubner, Market Co. <i>v.</i> . . . . .	301
Strong <i>v.</i> The District . . . . .	53, 242
Telegraph Company, Hewett <i>v.</i> . . . . .	424
Thaw <i>v.</i> Ritchie . . . . .	347
United States <i>v.</i> Evans . . . . .	281
United States, <i>ex rel.</i> De la Rua, <i>v.</i> Bayard . . . . .	310
United States <i>v.</i> Hamilton . . . . .	446
United States, use of Lang, <i>v.</i> May . . . . .	4
United States <i>v.</i> Lee . . . . .	489
United States <i>v.</i> Nardello . . . . .	503
United States, use of Pike, <i>v.</i> Hunter . . . . .	531
United States, <i>ex rel.</i> Smith, <i>v.</i> Whitney . . . . .	535
Waggaman, The District <i>v.</i> . . . . .	328
Wales, In re . . . . .	38
Wallace <i>v.</i> Prott . . . . .	259
Whitney, Smith <i>v.</i> . . . . .	535
Willard <i>v.</i> Wood . . . . .	538
Wolfe, Quill <i>v.</i> . . . . .	188
Wood, Endowment Association <i>v.</i> . . . . .	19
Wood, Willard <i>v.</i> . . . . .	538

## ERRATA.

The reader will please correct with his pen the following inaccuracies:

Page 65, 1st line of syllabus. For "assured" read *accused*.

Page 89, 9th line. Omit the word "must."

Page 127, 18th line. For "a" read *of*.

Page 172, 3d line after the syllabus. Omit the word "and."

Page 240, 9th line from bottom. For "Rusiele" read *Russel*.

Page 289, 5th line from bottom. For "previous" read *junior*.

Page 322, lines 6 and 7. Omit the words "of an obligation of public morality and good faith."

Page 396. For 1885, as date of decision in this and the succeeding case, read 1886.

Page 446. Add *Maurice Smith* as of counsel for defendant.

Page 580, 15th line. For "Wm. H. Larner" read *Wm. H. Lamar*.





# REPORTS OF CASES

DECIDED IN THE

## Supreme Court of the District of Columbia.

---

BAKER & BRO. *vs.* RAMSBURG'S SONS.

LAW. No. 23,795.

{ Decided March 23, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

Under the Statute of Limitations in force in this District (Md. Act of 1715—ch. 23, sec. 2) the limitation begins to run on the day after the cause of action accrues.

### STATEMENT OF THE CASE.

This was an action on a promissory note for \$306.75, dated 5th February, 1879, made by defendants in favor of plaintiffs, and payable five months after date, at plaintiff's office, in the city of Staunton, Virginia, with interest. By the statute of Virginia the note was not entitled to days of grace, so that the note matured on the 5th of July, 1879.

The declaration was filed, summons issued, and service had on defendants July 6, 1882. Counsel for respective parties agreed that, unless the note was barred by limitations, judgment might be entered for plaintiffs. Under this agreement the only question raised in the case was whether in the computation of the three years' limitation the day when the cause of action accrued, viz., the 6th of July, 1879, was to be included or not.

The court below included that day and rendered judgment for defendants, from which the plaintiffs appealed.

C. M. MATTHEWS for plaintiffs:

The statute provides that action shall be brought "with-

in three years ensuing the cause of such action, and not after." Act 1715, ch. 23, sec. 2.

A later part of the same section providing for limitations of actions *in tort*, "within one year from the time of the cause of action *accruing*."

The limitation *in contract* should read "within 3 years next after the cause of action accrued."

2. In the case at bar, the note was due July 5, 1879, and the defendants had all that day within which to pay; no action lay until the whole day (July 5) had expired, and the right of action did not accrue until the 6th of July, 1879. *Beaman vs. Cooke*, 48 Vermont, 203; *Whitewell vs. Brigham*, 19 Pick., 121, 122, and cases cited. *Little vs. Blunt*, 9 Pick., 491; *Hathaway vs. Patterson*, 45 Cal., 299; *Davis vs. Eppinger*, 18 Cal., 381; *Coleman vs. Carpenter*, 9 Barr, 179; *Thomas vs. Shoemaker*, 6 Watts & Serg., 182.

The right of action is the right to pursue in a judicial tribunal what is due and arises when and as soon as the party has a right to apply to the proper tribunal for relief. *Angell Limit.*, § 42.

3. The statute providing that suit shall be brought "within three years ensuing (or next after) the cause of action," (or the time of the cause of action accruing), the date, July 6, 1879, when the cause of action accrued, must be excluded from the computation of the three years.

As a general rule, where a period of time is to be reckoned from a particular event or date, whether under a contract or a statute, or in legal proceedings, the day of such date or event is to be excluded from the computation. *Judd vs. Fulton*, *Blackman vs. Nearing*, 43 Conn., 56; 10 Barb., 117; *Paul vs. Stone*, 112 Mass., 27; *Beaman vs. Cooke*, 48 Vermont, 203; *Merge vs. Frick*, 73 Pa. St., 140; *Cornell vs. Moulton*, 3 Denio, 13; *Sheets vs. Selden*, 2 Wallace, 177; *Bemis vs. Leonard*, 118 Mass., 505. Which latter case discredits the cases cited in *Angell*, § 45.

The terminus from which to compute time is in matters of bills and notes excluded. *Angell*, § 49.

It is submitted that in none of the cases cited for defend-

ant are the facts of the present case found, and that the statute does not bar this action.

R. A. BURTON for defendants:

1. The statute begins and runs the moment credit expires or the debt has become due and demandable. *Little vs. Blunt*, 9 Pick., 488; *Hathaway vs. Patterson*, 45 Cal., 299; *Davis vs. Eppinger*, 18 Cal., 381; *Angell Lim.*, par. 42, 45, 49; *Parsons Notes & Bills*, vol. 2, 639, 640.

2. Plaintiff had three full years following the day on which the note matured within which to bring his action, and no longer. *Presbry vs. Williams*, 15 Mass., 193; *Hibernia Savings & Loan Society vs. O'Grady*, 47 Cal., 579; *Beaman vs. Clark*, 48 Ver., 201.

Mr. Justice JAMES delivered the opinion of the court.

The note on which this suit is brought was due July 5, 1879, and the suit was begun on July 6, 1882. The only defence interposed is the Statute of Limitations, which provides that such suits shall be brought "within three years ensuing the cause of such action, and not after." Act 1715, ch. 23, sec. 2. If the day on which the cause of action accrued, which in this case was July 6, 1879, is to be included, the action was begun one day too late; if excluded, it was brought in proper time. Authorities differ on this point, but we prefer the rule followed in New York and Pennsylvania, which excludes the day on which the cause of action accrues, as a point of time after which the limitation ensues. The three years of limitation ensuing the 6th of July, 1879, had not expired when this suit was brought. Judgment is, therefore, for plaintiff.

UNITED STATES, to the use of JOHN LANG ET AL.,  
vs.

PHILIP MAY AND PETER MAY.

LAW. No. 23,172.

{ Decided March 23, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. When an executor, who is also a guardian, has no further use for assets as executor, he will be treated as holding them as guardian, whether he has settled his account or not; no particular form, such as endorsement from himself as executor to himself as guardian, is necessary to effect a transfer, that being done by the law.
2. A trustee has always the right to come into court and surrender his trust; and when he does so, and is thereupon relieved of his trust on paying the funds into court, he cannot be held for any loss subsequently occurring.

THE CASE is stated in the opinion.

J. J. JOHNSON and CHAS. A. ELLIOT for plaintiffs:

It is well settled that if an executor has in his hands a good and collectable note, received by him in the due course of administration, and fails to collect it, or allows it to get out of his possession, whereby loss inures to any one interested in the estate, he is liable for a *devastavit*. It is upon this principle that the plaintiffs seek to recover in this case.

All debts were paid, and they ought to have received two-thirds of said note; but the same, through the act of the executor, got into the hands of the widow of Lang, and has been lost to the estate.

It is insisted by the plaintiffs that they are entitled to recover in this action; but the defendants, by way of defence, show that Philip May was also testamentary guardian of plaintiffs, and in January, 1872, on his own petition, was relieved by order of the Orphans' Court as guardian, and directed to turn over to the court the assets in his hands; and in pursuance thereof he delivered the note to the register of wills, who afterwards, on a verbal order, as it is claimed, of Mr. Justice Olin, delivered it to the widow of Lang, who has disposed of it.

Prior to the passage of the order revoking the certificate of guardian, the defendant's account as executor had been

approved and passed, and distribution ordered; but in this account the executor does not charge himself with the note, but only the interest thereon collected by him.

This fact alone shows that he understood perfectly well that his executorship continued until the payment of this note, and that another account and order of distribution was necessary.

He was bound to exercise at least ordinary care in preserving the assets; and this he did not do.

Under an order of court relating to assets in his hand as guardian (and he knew what they were, for he had previously settled his accounts in that capacity) he parted with assets held by him as executor, and not referred to or embraced in the order, and thereby the plaintiffs have lost their share of the proceeds.

An executor having once qualified continues to be executor, and is liable for any loss to the estate through his fault, until all the assets, as far as possible, have been collected, and an order of distribution made. In the present case the defendant received the note as executor; and, it not being divisible, and the widow having an interest in the proceeds jointly with the plaintiffs, he held the note in that capacity until its maturity; and, as shown by the record, the note did not mature until about a month after he turned it over to the register. Nor does it make any difference that he was testamentary guardian of the plaintiffs, and that the court relieved him. The order could only operate on any assets in his hands as guardian, and at that time he held the note as executor. He had not charged himself in his account as guardian with any part of the note; and until he had done some act to charge himself in a different capacity, he in law held it, and was bound to account for it as executor, having received it as such. *Newcomb, judge, v. Williams*, 9 Met., 532, 533; *Conkey, judge, v. Dickinson*, 13 Met., 53, 54; *Prior, executor, vs. Talbot et al.*, 10 Cush., 1; *Miller et ux. vs. Congdon, executor*, 14 Gray, 114; *Hall, judge, vs. Mackay*, 9 Pick., 395; *United States, in re Turnburke, vs. Parker*, 2 Mac A., 444, 451; 2 Perry on Trusts, sec. 574.

A. C. BRADLEY for defendant :

When the defendant had settled his first and final account, all debts of the deceased having been paid, it became his duty to deliver up the estate in his hands to those entitled. Act of Maryland, 1798, c. 101, subc. 10, sec. 6.

From that time, as he was acting in the two capacities of executor and testamentary guardian, under bond in the latter as well as the former, he held the interests of his wards in the assets in the capacity of guardian, and became responsible to them as such, although no account was filed, in which, as executor, he distributed the note in controversy to himself as guardian. *Seegar vs. State*, 6 H. & S., 162; *Watkins vs. Wells*, 2 G. & J., 220; *State vs. Jordan*, 3 H. & McH., 180; *Kirby vs. State*, 51 Md., 392; *State vs. Chester*, 51 Md., 376; *Bank vs. Sharp*, 53 Md., 527.

As guardian, he acted prudently and carefully, in committing the assets in his hands to the custody of the court, and he could not be held responsible for any subsequent loss. It would have been equally commendable and protective to him as executor, had he surrendered the assets to the custody of the court nominally as executor.

An executor or trustee who acts in good faith and with ordinary prudence and care, will not be charged with loss. 2 Williams, Exec., \*1630; *Thompson vs. Brown*, 4 Johns. Ch., 619.

Mr. Justice WYLLIE delivered the opinion of the court.

John Lang, by his will, bequeathed one-third of his property to his widow and the residue to his two sons, and appointed Philip May, one of the defendants, executor, who duly qualified, and letters testamentary were issued to him on the 20th of November, 1869. The defendant, Peter May, was one of his sureties. Among the assets of the estate was the note of Nicholas May, dated February 21, 1867, for \$1,200, payable, to the order of John Lang, five years after date, with interest at six per cent. and secured by deed of trust upon real estate. The note was good and collectable on maturity, and came into the hands of Philip May, the

executor. The suit is based upon the supposed right of the plaintiff to recover by reason of the failure of the executor to collect the amount due on this note, two-thirds of which the plaintiffs claim. On the same day that May secured his letters testamentary he also qualified as guardian for the plaintiffs, who were then about the respective ages of thirteen and three years.

In his first and final account as executor, he charges himself with interest collected on this twelve hundred dollar note, but neither charges himself with the note as executor or guardian. In January, 1872, in contemplation of a visit to Europe, he filed a petition praying to be relieved of his duties as guardian, and, on the same day, an order was passed revoking the certificate of guardianship. That order recites that the guardian had turned over to the custody of the court the balance of the funds due to his wards, among which was this note for twelve hundred dollars.

As executor, this note was never embraced in his inventory, but, when he came to settle his final account as executor, he charged himself with certain interest upon the note. The settlement of that account showed that all the debts were paid, and that this note was in his hands at the time. But whether in his hands as executor or as guardian depends upon circumstances.

The authorities in Maryland upon this subject are very decisive. It is settled there that from the time the executor who is also guardian has no further use for assets as executor he will be treated as holding them in his capacity of guardian whether he has settled his account or not. *Watkins vs. Wells*, 2 G. & J., 220; *State vs. Jordan*, 3 H. & McH., 180; *Kirby vs. State*, 51 Md., 392; *State vs. Chester*, 51 Md., 376, and *Bank vs. Sharp*, 53 Md., 527.

Having, therefore, no further use as executor for this note, in construction of law, he must be considered as having held the note as guardian.

But it is said that he did no act to transfer it; that he did not indorse it from himself as executor to himself as guardian. That is very true, but the indorsement is not neces-

sary in a case of that kind. An executor sues in his capacity as executor for any debts due the estate by virtue of the authority conferred upon him by the law, and so it is as guardian. If the guardian is entitled to the property under a certain sense of it the law gives him the authority to sue. He derives his authority from the law, and not from any transfer from himself as executor to himself as guardian.

The law conferring the authority upon him, then, as guardian to bring suit for whatever is collectable, for whatever assets belong to him in that capacity, there is no form required to effect a transfer of assets from himself as executor to himself as guardian. The law effects the transfer and gives him the power in any proper case to bring suit.

It is true also the executor is a trustee for the legatees. The debts having been discharged he held this note as trustee for these two children. What results from that? He held the note in the first instance as executor, but then it was in trust for himself representing the children as guardian, and when he took this note along with the other assets into the court, that was a formal announcement that he held the note or claimed to hold the note as guardian for the children.

He was anxious to get away. He was discharged already as executor when he closed his personal final account. What was he to do with this note? It was not due yet. He held two-thirds of it for these minors, and the other one-third for the widow. Well, he did as any trustee has always a right to do; it is always the privilege of a trustee to come into court and surrender his trust. There is no kind of trust in which the trustee may not be discharged in that way if he proceeds properly. So this defendant presented himself before the Orphans' Court and produced the note and some other assets. He said, "I hold this note for these children—two-thirds of it—and the other one-third belongs to the widow. I have settled my account although it is not due, I have not the money in hand and cannot divide and distribute it, but two-thirds of this note belong to me as guardian, and I want to be discharged from this trust." And



the court made an order discharging him from his trust as guardian on his turning over to the custody of the court all the assets in his hands. He then went his way. He had discharged his trust as executor and was relieved of his trust as guardian, and the court had all the property of the estate in its hands. These children were yet minors; it was probably the duty of the court to assign another guardian for them; but it was not done—probably they were not there, and the guardian could not be appointed in their absence. The court in the meantime took the custody of the property.

But some time after this guardian had been discharged and had left the country, the justice who was at that time holding the Orphans' Court, directed the register of wills, who had the actual custody of this property in his hands, to turn over this note to the widow. This was done, and she subsequently disposed of it and failed to account to the children for their share of it.

Now, these children have brought an action of *devastavit* against Mr. May, in his capacity as executor, for the loss of this two-thirds of that note; a loss which would never have occurred if the court had kept the custody of the note. The court had it in its power to appoint a receiver to collect it, if it had seen proper. But instead of doing that, it directed, by some irregular order, the register to turn this note over to the widow, and there the injury was done. There was no injury done by the discharge of Mr. May from his trust as guardian, nor by taking the custody of the property into the hands of the court. The injury which was done followed from the act of the court in directing the register to turn this note over to the widow. Undoubtedly that was an irregularity, but it was an irregularity on the part of the court; and it ought not to affect the defendants in this case.

The defendant acted in good faith, and not only in good faith, but he acted according to law; and as the loss did not follow from any misconduct or negligence of his, but rather in consequence of an irregular order of a justice

of this court, holding at that time the Orphans' Court, he ought not to be held liable. We think it is perfectly clear that it was not in consequence of any conduct of this defendant that this note was lost to these children.

The judgment is therefore affirmed.

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ROBERT C. HEWITT vs. SAMUEL E. LEWIS, Administrator.

EQUITY. No. 7,756.

{ Decided March 23, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. Verbal admissions ought to be received with great caution; the evidence consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say. *So held* in a case where the court, citing the above from 1 Greenl. Ev., § 200, refused to disturb a written contract by evidence of admissions casually made in a conversation held many years before the date of the witness' testimony.
2. The Statute of Limitations is a good plea in bar of a suit against the representatives of a deceased partner for an account, if there have been no dealings within three years before the filing of the bill, and no admissions on the part of the testator or the representatives to take the case out of the statute.
3. The moment the partnership ceases, the partners become tenants in common of the partnership property.
4. Where an action of account would lie at law, and instead thereof a resort is had to a bill in equity, the Statute of Limitations is just as imperative as it is at law.\*

THE CASE is stated in the opinion.

COOK & COLE for plaintiff.

WM. F. MATTINGLY for defendant.

Mr. Justice WYLIE delivered the opinion of the court.

Robert C. Hewett and Thomas Lewis were contractors under the District government some years ago. Lewis held

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\*This case was decided upon the doctrine laid down in note 1 of the above syllabus. The subsequent notes are more properly but a digest of the individual views of the learned justice delivering the opinion, as will be seen by reference to his closing remarks.

the contract in his name, but Hewett was interested as a partner.

On the 31st of July, 1875, having closed their work under their contract, they had a settlement, and the property was divided, each one taking his own share and they interchanged receipts, Hewett receipting to Lewis for his share and Lewis receipting to Hewett for his share. It was a final settlement with the exception that both receipts reserved the right of the parties in collections that might afterwards be made, on account of their contracts, from the District government, and when collected they were to be divided. There was no reservation in these receipts as to any property except these collections to be made from the District government, and, except as to them, they purport on their face to be a final settlement.

This was on the 31st of July, 1875. Thomas Lewis died in 1880, five years afterwards. In 1883, the bill was filed against the administrator of Thomas Lewis on the part of Hewett, praying for an account and a decree of one-half of the proceeds of a lot of tools amounting to over \$2,700 in value which the complainant avers had not been disposed of, and that Lewis retained at the time of the settlement, and it is claimed that those tools did not enter into this settlement. The bill was filed nearly seven years after the settlement, and nearly three years after Lewis' death.

There has been a good deal of testimony taken in the case, mainly on the part of the complainant; and the strongest evidence in favor of the complainant in regard to these tools is that given by a witness named Hamilton. Hamilton was the complainant's bookkeeper, and he testifies that according to his understanding at the time, although he is not very positive about it, that these tools did not enter into the final settlement. But he testifies that in the fall of the year or in the early part of 1876, soon after the final settlement was made, that he had a conversation with Lewis in a saloon on Fifteenth street, in which Lewis told him that the partnership affairs had all been settled with the exception of the tools, and that Lewis seemed to be very much pleased that the business had been so settled.

Now it is sought, principally in consequence of this admission, to open this settlement and require an account on the part of these defendants mainly on that proof. As to the credit to be given to these admissions, it is laid down in section 200 of Greenleaf's Evidence, Vol. I, as follows:

"With respect to all verbal admissions, it may be observed that they ought to be received with great caution, the evidence consisting, as it does, in a mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement at variance with what the party actually did say."

So that we think that the written contract of the parties ought not to be disturbed in this case by these admissions proved in that way and in that place. They might have been misunderstood. The omission of a few words might have changed the whole meaning, and it is not safe to overthrow the written agreements of parties by testimony of so weak a kind as admissions of this sort, the testimony concerning which is taken many years after the occurrence. On that ground alone we are of opinion that this bill ought to be dismissed.

But then there is the defence of the Statute of Limitations. It is said that here was a trust; here was a partnership continued as to this, and that no Statute of Limitations runs in such a case. But our statute says:

"All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, surtrovers or replevin for taking away goods or chattels, *all actions of account*, contract, debt, book or upon the case, other than such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants which are not residents within this province, all actions of debt for lending or credit without specialty, all actions of debt for arrearages of rent, all actions of assault, menaces, battery, wounding and impris-

onment, or any of them, shall be sued or brought by any person or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time and limitation hereafter expressed and not after; that is to say, *the said actions of account* and the said actions upon the case, upon simple contract, book debt or account, and the said actions for debt, detinue, and replevin for goods and chattels, and the said actions for trespass *quare clausum fregit*, within *three years* ensuing the cause of such action and not after."

Here is a statute which bars the action of account in three years except as to accounts between merchant and merchant, and there is no pretense that this is an action between merchant and merchant. There are no books. The whole foundation for the claim in this case is a promise on the part of Lewis as alleged to account for this property.

A case very similar to this is that of *Codman vs. Rogers* in 10 Pick., 112, where it is said—I read from the syllabus:

"A bill in equity for an account alleging a partnership between two by indenture, and a dissolution by the death of one of the partners, and a parol promise by the survivor to account to the plaintiff as executor of the deceased partner. It was held that the suit was not founded upon the indenture, but upon the subsequent parol contract, and, therefore, that the Statute of Limitations might be pleaded in bar."

That was a case where one of the partners had died, and the surviving partner promised the executor of the deceased partner to account for certain partnership property, and it was held that that was a case within the statute.

In Collyer on Partnership, section 374, it is said:

"The Statute of Limitations is a good plea in bar of a suit against the representatives of a deceased partner for an account, if there have been no dealings within six years before the filing of the bill and no admissions on the part of the testator or the representatives to take the case out of the statute."

Our limitation is three years between partners, and the

doctrine there is that between partners with no dealing between them, as is the case here, they are regarded as strangers. The moment the partnership ceases, the partners become tenants in common of the partnership property. This is laid down in section 545 of the same work, citing *Murray v. Munford*, 6 Cowen, 441.

Where an action of account would lie at law and instead of an action at law being brought a resort is had to a bill in equity, the Statute of Limitations is just as imperative as it is in a case of an action at law.

In *Kane vs. Bloodgood*, 7 Johns. Rep., 111, Chancellor Kent says, at p 114:

"The trusts which are not reached or affected by the Statute of Limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity."

Then, at page 117, of the same case, he says:

"The statute is a bar to any demand from one tenant in common against another for an account further back than six years."

And at page 118 he says:

"Where there is a legal and an equitable remedy in respect to the same subject matter, the latter is subject to the same control of the statute as the former."

On page 122 of the same case and in *Story's Equity*, vol. II, § 1520, is the same principle. In the case just cited Kent overrules his own decision made a few years before in the case of *Coster vs. Murray*, reported in 5 Johns. Rep., 522.

It is an interesting discussion in regard to this question as shown in these two cases. In the case of *Coster vs. Murray*, at page 521, he says:

"The other ground, taken by the plaintiffs' counsel appears to me to be decisive, in their favor, and to take the case out of the statute, without having recourse to a *proviso*, which, if originally clear upon the text itself, has been rendered perplexed and litigious, by the commentaries of

counsel, and the contradictory doubts and decisions of courts.

If there was a trust created in the defendants, to account as agents or trustees, for these goods, or the avails thereof, the case is not within the statute, for that does not reach to matters of direct trust as between trustee and *cestui que trust*. (*Vide* the cases referred to in 1 Eq. Cas., Abr., 303, A, and 3 Johns. Ch. Rep., 216, 222.) It appears very clearly that here was a trust, a deposit to be accounted for. The defendants assumed the charge and direction of the goods in which the Columbian Insurance Company had an interest to one-third part. They became the agents or factors of the company, as to the amount of their interest, and were entitled to their reimbursement and indemnity for all charges and expenses incurred by them in the execution of the trust. The defendants were to have no commissions if they sold the goods, and the deposit with them was in the nature of a gratuitous bailment or trust. The parties were not partners, and accountable for each other's acts. They had respectively their *aliquot* shares of the cargo, shipped by the defendants from Copenhagen, and the latter had the possession and control of the entire interests of both parties, and assumed the direction and disposition of the whole, and were to account to the company for their proportion of the proceeds. This was a plain case of trust. The parties stood not in the relation of debtor and creditor, or of joint partners in trade, but in the relation of agent or factor and principal, and the Statute of Limitations does not apply to the case. In *Godfrey vs. Saunders*, 3 Wils., 94, the defendant was sued in an action of account, as factor. He pleaded the Statute of Limitations, that there was not any open account between them within six years. The plaintiff replied, that he was a merchant, and the defendant his factor, and *had the care of goods to render an account*, and that the account concerned trade and merchandise, and was never adjusted. The defendant rejoined that the account did not concern trade and merchandise. Upon the trial this issue was given up by the defendant's counsel, and the jury found for the plaintiff, and there was a judg-

ment *quod computet*. This is a case showing clearly that a factor is responsible upon an open account, though not within six years."

The nature of the case will be seen from the opinion as far as I have read. Now let us see what the chancellor says in *Kane vs. Bloodgood*, 7th Johns. Ch., 91, a case which was very fully argued, and which contains one of the chancellor's most elaborate opinions. Referring to the case of *Coster vs. Murray*, he says at page 128:

"In the still more recent case of *Coster vs. Murray*, 5 Johns. Reps., 522, I referred generally to what was said by me in the preceding case, that the statute did not reach to matters of direct trust, as between trustee and *cestui que trust*; and I held that the statute did not apply to the case of a gratuitous bailment or trust. But though that decree was affirmed in the Court of Appeals, yet, I understand, it was upon other ground than that upon which I had rested the decree, and that the judges of the Supreme Court did not consider it as the case of a trust not within the reach of the statute, because an action at law, of account, or for money had and received, could have been sustained for the same matter, and the equitable remedy, in a case of concurrent jurisdiction, was subject to the same limitation as the legal. If I am not misinformed as to the decision, (for the case has not, as yet, been reported,) it is a decisive authority, in favor of the doctrine which I have now endeavored to deduce from the history of the cases; and it was the discussion upon the appeal in that very case, that led me to suspect that I had been misled by some of the earlier decisions, in the time of Charles II, on which I have now ventured to comment freely, and by the exceedingly loose manner in which the rule as to trusts, had been spoken of in the books."

After the dissolution of the partnership where the agreement is that one partner shall have the exclusive possession of a certain portion of the assets to dispose of, the right in the property is changed. During the partnership each has the same rights as the other in disposing of the



property. After the dissolution of the partnership, there is nothing left except such agreement as may be made and which will bind the parties by its terms. The relation of the parties is changed. After a partnership is dissolved the partners become tenants in common in the property if there is no agreement to the contrary. But in this case these parties were not even tenants in common, because, if we believe the bill, this property was placed in the hands of Lewis to be disposed of and the proceeds to be accounted for to the other, and in that respect it is like the case of *Kane vs. Bloodgood*. As to the Statute of Limitations, wherever an action at law would lie, it is just as obligatory in courts of equity as in the courts of law. The statute begins to run from the date of the contract. There is nothing in the exceptions to the statute regarding merchants' accounts which would take this case out of its operation, because there are no accounts between the parties. The last entry in the partnership books between these parties was in April, 1875, in regard to this very item. This action of account might have been brought within a week after the arrangement was entered into, if there was such an arrangement, and parties cannot be held forever in a case like this without protection, especially after one of the parties is dead, and an administrator, knowing nothing about the circumstances, is made the defendant.

In Story's Equity, vol. I, section 662, the author says:

"The most extensive and generally the most operative remedy at law between partners is an action of account. This is the appropriate, and, except under very peculiar circumstances, the only remedy at the common law for the final adjustment and settlement of partnership transactions. It is a very ancient remedy between parties in which one naming himself a merchant may sue his partner for a reasonable amount, naming him a merchant, as the receiver of the moneys of himself, arising from whatever cause or contract, for the common profit of both according to the law merchant."

In place of the action of account at common law the remedy

most in use is a bill for an account, but where the remedies are concurrent, the common law remedy and the equity remedy, the statute is a bar in both cases, and it does not remain with the court, according to its discretion, to apply the statute or dispense with it as they may think proper and as may be done in some other cases.

If this is to be regarded as partnership property, and if the partnership is to be regarded with respect to this property, an action of account would lie by one of the parties against the other, the one naming himself as a merchant, and the other as a merchant having mutual accounts. But in this case there are no mutual accounts. The statute, therefore, runs from the beginning, and that disposes of the matter.

I have expressed largely my own views in what I have said in regard to this case, but none of us entertain the slightest doubt about what the decree in the case should be, and that is that the bill should be dismissed.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION

vs.

GEORGE H. WOOD ET AL.

EQUITY. No. 8,618.

Decided April 13, 1885.

The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. When the object of the trust fails, there is a resulting trust to the grantor.
2. In construing a trust, the court will consider all the surrounding circumstances of the case, and when proper and necessary, it will receive parol evidence for the purpose of ascertaining the intention of the parties.
3. A beneficial association in the nature of an insurance company, issued to J., one of its members, a certificate of insurance, by which it agreed with him to pay to his wife, or her legal representatives, \$500 within sixty days after his death. The wife died, and thereafter, without making any change in the beneficiary, J. died, whereupon the legal representatives of the wife claimed the fund.

*Held*, That this was a trust intended for the wife alone, and that upon her death it resulted to the husband, whose estate, on his death, was entitled to the fund.

*Held*, also, that the words "legal representatives" as here used have no signification different from that which is attributable to those words generally; viz: persons appointed either by will or by the law to administer upon the estate of a deceased.

STATEMENT OF THE CASE.

This was a bill in equity filed against George H. Wood, administrator of the estate of Kate Wood Jones and Lucy E. De Hart, heir at law of, and administratrix upon estate of, Daniel S. Jones, who was the husband of said Kate Wood Jones.

It avers the incorporation of The Washington Beneficial Endowment Association under general act of Congress. The object of the association being to provide an endowment fund to be paid to the persons entitled thereto, on the death of the party named in the certificate of endowment; that May 18, 1878, Daniel S. Jones applied for an endowment certificate in the association, directing that the benefits be paid to his estate; that a certificate of \$500 was accordingly issued; that September 29th, 1879, he applied to have the beneficiary changed, whereupon the original certificate was

surrendered and a new one issued wherein it was agreed to pay the benefits to Katie Wood Jones, or her legal representatives; that Daniel S. Jones died September 7, 1882, at St. Elizabeth's Hospital for the insane, where his wife had died before him, in February, 1881; that defendant, Lucy E. De Hart, had applied for letters of administration on the estate of Daniel S. Jones, and that, also as his heir, she demanded the said \$500; that said Wood, as administrator of the wife's estate, also demanded the said money; that said Jones having survived his wife, and adverse claims being made, the complainant was unable to determine which claimant is entitled to the fund. The bill prayed that the defendants might interplead in regard to the fund (which was paid into court), the association having no interest therein but to pay it to the party entitled.

Answers were filed by the defendants; Lucy E. De Hart claiming the fund as heir at law of said Jones, and Wood claiming the same as administrator of the estate of Mrs. Jones. The certificate of endowment in question contained the following clause: "The Washington Beneficial Endowment Association hereby agrees with the said Daniel S. Jones to pay—unless the beneficiary be changed as herein-after provided—to Katie Wood Jones, or her legal representatives, the sum of five five hundred dollars," &c.

Lucy E. de Hart was not the administratrix of the estate of Jones, as she had never been appointed, though she had applied for such letters.

Under an order of the court the complainant paid the money into the registry of the court; and when the cause came on for hearing the court was of opinion that the fund rightfully belonged to the estate of the husband, Daniel S. Jones; but as there was no legal representative of his before the court, entry of a decree was suspended until some one should be appointed.

Thereafter Benjamin F. Leighton was appointed his administrator, applied to be made a party in the cause, was admitted as such, and a decree passed June 11, 1884, declaring the estate of said Jones to be entitled to the fund,

and directing the clerk to pay it over to said Leighton, as such administrator, which was done. From this decree Wood, as as personal representative of Mrs. Jones appealed.

EDWARDS & BARNARD for appellant Wood:

What was meant by the use of the words "to pay to Katie Wood Jones, or her legal representatives," contained in the contract of insurance?

In answering this question aright it must be remembered that, in the first place, the contract was to pay the \$500 to the estate of the said Daniel S. Jones, and thereafter, on the application of said Jones, the new contract was made. He may have contemplated the prior death of his wife in making that change, knowing that the said money in that event would go, first, to pay her burial expenses; second, any debts she might owe; and, third, the surplus, if any, to her immediate relatives. And this might have been an attempt on his part to restore to his wife's relatives a portion of moneys given to her by them, and of which he had shared the full benefit. Had such been the sole object of his application to change the beneficiary, could more apt words have been chosen?

The meaning of the words, "legal representatives," has been declared in many cases; and there can be no other than the ordinary one given in this case, if any is to be given at all; and the court cannot presume the words were used with the intention of meaning nothing. *Cox vs. Curwen*, 118 Mass., 198; 2 Wms. on Ex'rs, p. 1129.

No case has yet gone so far as to apply the doctrine of lapsed legacies to benefits provided by contracts of insurance; and very many cases hold that the beneficiary named in such contracts has a vested interest the moment the policy is issued, which cannot be taken away by the insured. *May on Insurance*, sec. 392; *Bliss on Life Ins.*, secs. 318, 337; *Ricker vs. Charter Oak Life Ins. Co.*, 27 Minn., 193.

It is expressly provided in this policy—

"That no change in the beneficiary named herein, nor assignment of this certificate, can be made without the con-

sent of the board of trustees of said association, and under such conditions as they may prescribe."

No attempt was made to effect a change either before or after the wife's death; so there can be no question here, unless a change is made by the mere operation of law, the contracting parties neither suggesting a change nor consenting to one.

The law works no such results; it leaves parties free to make their own contracts, and aids each in the enforcement of the same against the other in proper cases. *Conn. Mut. Life Ins. Co. vs. Schaefer*, 94 U. S., 460, 462.

Courts have held, in many similar cases, that the insurance money should be paid to the wife's administrator. *Foster, Adm'r, vs. Gile*, 50 Wis., 603; *Hutson vs. Merrifield*, 51 Ind., 24; *Swan vs. Snow*, 11 Allen, 224; *Roe vs. Mut. Life Ins. Co.*, Bliss on Life Ins., sec. 325, note; *Phoenix Mut. Life Ins. Co. vs. Dunham*, 46 Conn., 79-87.

It may be contended that this contract was a *chose in action* belonging to the wife, which at her death devolved upon her husband under the Maryland statute of 1798, ch. 101, sub. ch. 5, sec. 8. *Thompson's Digest*, 33.

This cannot be a correct view, for two reasons. First, because at the time of her death she had no *chose in action*, properly speaking, for she had no right of action—no ground for suit—until her husband's death; and, second, if it was a *chose in action*, in any proper sense, the husband did nothing to reduce it to possession, or to assert ownership of it, as required to deprive her estate of title. *Sheldon vs. Sill*, 8 How., 449; *Bouv. Law Dic.*, title, "*chose*;" *Ramsey vs. Gould*, 57 Barb., 408; *Schouler's Husband & Wife*, sec. 152 *et seq.*; *Kelly's Contracts of Married Women*, 50; *Latourette vs. Williams*, 1 Barb., 9; 1 *Parsons on Contracts* (5th ed.), 341, note c.

To reduce a *chose in action* to possession, so as to acquire title under the statute aforesaid, requires the actual collection of the money, or of property in lieu of it, or the entry of a judgment for it. *Bird vs. Bird*, 18 Md., 484; *Crane vs. Gough*, 4 Md., 316; *Hinckley's Test. Law*, sec. 1506.

J. J. JOHNSON and B. F. LEIGHTON for Jones' administrator :

The interpretation of a contract is the only question presented by the case at bar, unembarrassed by statutory regulations or association by-laws. From an inspection of the certificate upon which the applicant bases his right to the fund in controversy, it appears that the right to change the destination of the fund was expressly reserved, subject only to the assent of the association; that the certificate was to become void unless there was a compliance with the conditions therein expressed, one of which was the punctual payment of dues; that Kate Wood Jones was designated as the beneficiary of the fund; that the fund was to be paid to the beneficiary, "or her legal representatives," within sixty days after satisfactory proof was made to the association of the death of the insured, and that the beneficiary might assign the certificate, with the assent of the board of trustees of the association, subject to such conditions as it might prescribe.

What is the thought of this scheme? What its purpose and intent, are questions submitted to this court for its solution. The relationship of the insured to the beneficiary is not disclosed by the certificate itself, but it is admitted on all sides that she was his wife. The obligation of supporting the wife is imposed upon the husband by law; and the law provides for the maintenance of the widow out of the deceased husband's estate. To discharge this duty, to provide a fund for his wife's subsistence in the event that she survived him, was the obvious purpose of the insured in designating her as the beneficiary. The husband was the party insured, and not the wife, and he had the power to name an appointee to receive the fund when it should become payable. *Campbell vs. New England Life Ins. Co.*, 98 Mass., 389; *Rauls vs. American Mutual Life Ins. Co.*, 27 N. Y., 287; *Valton vs. The National Fund Life Assurance Co.*, 20 N. Y., 32.

By the very terms of the policy the right to designate another beneficiary was expressly reserved. The policy be-

came void on the non-payment of dues, and there was no obligation upon the husband to keep it in force. She had the mere possibility of obtaining the fund provided she survived her husband, and not a vested interest. *Connecticut Mutual Life Ins. Co. vs. Burroughs*, 34 Conn., 313; *Eadie vs. Shinn*, 26 N. Y., 9; 46 Conn., 89.

The contract is testamentary in character, and the same rules of construction apply as in the interpretation of testamentary writings. *Continental Life Ins. Co. vs. Palmer*, 42 Conn., 64. The appointment being ambulatory and subject to revocation lapsed on the death of the designated beneficiary. *In re Davies*, 13 Eq., 163; *Oke vs. Heath*, 1 Vesey, 135; *Easum vs. Appleford*, 5 M. & C., 56; *Lord Godolphin's Case*, 2 Vesey, 78; *Jeafferson's Case*, 2 Eq., 276; *Wilkinson vs. Schneider*, 9 Eq., 423; *Vanderges vs. Aclam*, 4 Ves., Jr., 771; *Haines' Case*, Johns., 199; *Larkin vs. Larkin*, 34 B., 443; *Burgess vs. Mowbery*, 10 Ves., Jr., 319; *Stone vs. Evans*, 2 Atk., 86; *Elliott vs. Davenport*, 2 Vernon, 521; *Hermon vs. Howard*, adm'r, 23 Wis., 108; *Mackring vs. Mitchell*, 1 Barb. Ch., 284; *Mutual Ben. Life Ins. Co. vs. Atwood's Adm'r*, 24 Gratton, 497; *Gamb's Public adm'r vs. Covenant Mutual Ins. Co.*, 50 Mo., 44. This is so unless the appellant has an original and not a derivative title to the fund, and takes by way of substitution and not as the representative of the wife. If this be true, the remarkable spectacle is exhibited of a husband spending his money for the purpose of establishing a fund for the endowment of the remote kindred of the wife. That such could have been his purpose, is, in the language of the learned judge who decided this case below, "incredible." The words legal representatives have no technical meaning. *Wear et al. vs. Bryant*, 5 Mo., 159. When found in instruments relating to the administration or settlement of estates they generally mean executors or administrators. When employed in other instruments they are to be construed as assignees, purchasers or lawfully authorized agents, according to the sense in which they are used. *Wameck et al. vs. Lembeca*, 71 Ill.; *Relief Association vs.*



McAuley, 2 Mackey, 77; Grand Gulf R. R. Co. *vs.* Bryant, 8 S. & M., 275; Delana *vs.* Burnett, 9 Ill., 4691; The People, etc., *vs.* Phelps, adm'r, 78 Ill., 148; Davis *vs.* Davis, 26 Cal., 31. By an express provision of the certificate it may be assigned by the beneficiary, and the rights accruing thereunder be conferred upon some third person, subject only to the assent of the board of trustees of the association, and limited by such conditions as it sees fit to impose. Suppose there had been a valid assignment of this certificate, who then would have been the legal representative of the beneficiary? Suppose an assignment be made and the insured dies, leaving the beneficiary surviving, so that the fund becomes payable, to whom should it be paid, the beneficiary or her assignee? There can be but one answer to this question. It is a fact known to this court that these policies are frequently used as a means of procuring credit, and it is obviously essential to the stability of the security that the power of revoking the assignment be controlled by the association. The contract should be read in the light of these attending facts. Warnecke *et al.* *vs.* Lembeca, *supra*. The words "legal representatives," as employed in this contract, have, then, a general and not a special meaning. They stand for assignee, pledgee or authorized agent, otherwise no force or effect can be given to that clause of the certificate providing for its assignment, and it would be no security for a loan of money, nor could it be used as a means of procuring credit. Give to the words the interpretation sought to be put upon them by the appellant, and would it not follow that the fund belongs to him? It was to be paid by the association to the beneficiary, or her legal representatives, within sixty days after satisfactory proof had been made to it of the death of the insured. Should the beneficiary die, therefore, after the insured and before the payment of the fund, its collection would devolve upon her legal representatives, and if no assignment had been made, the words would bear their ordinary signification and stand for executors or administrators. The insured in the case at bar was an insolvent debtor, and the appellee ob-

tained letters of administration on his estate as a judgment creditor. The appointment of a beneficiary being in the nature of a testamentary disposition of the proceeds of the policy cannot, in the absence of a statute or by-law of the association authorizing it, stand as against the insured's creditors. *Hathaway vs. Sherman*, 61 Me., 466; *Rison vs. Wilkerson & Co.*, 3 Sneed, 566.

Mr. Justice WYLLIE delivered the opinion of the court.

This is a bill of interpleader brought by the complainant against two parties for the purpose of having the court decide to which of the two a certain fund belongs. In 1878 Daniel Spaulding Jones became a member of the Washington Beneficial Endowment Association of the District of Columbia, paid his fee of initiation and bound himself to pay any dues that might be assessed upon him afterwards for the purpose of meeting the necessities of the company.

This Beneficial Endowment Association is a life insurance company on the mutual plan. The members contribute so much on joining, and when one dies his estate is entitled to a certain fund to be paid by the society, and there is an assessment made upon the members for the purpose of making up that fund. Every man who becomes a member of the association, besides paying his initiation dues, is liable to these calls on the death of his associates, and when he dies the other contributors make up the amount due to his estate.

The certificate of membership recites as follows:

"In consideration of the representations made to the Association in said application and the agreement and the conditions above set forth, all of which are hereby accepted and made part of this contract, and in further consideration of the sum of five dollars in cash, and a note for eight dollars, receipt for which is hereby acknowledged, The Washington Beneficial Endowment Association hereby agrees with the said Daniel S. Jones to pay—unless the beneficiary be changed as hereinafter provided—to Katie Wood Jones, or her legal representatives, the sum of five

hundred dollars within sixty days after satisfactory proof of the death of said Daniel S. Jones has been received and accepted by this Association, provided, etc."

"It is further agreed that no change in the beneficiary named herein, nor assignment of this certificate, can be made without the consent of the Board of Trustees of said Association, and under such conditions as they may prescribe."

Kate Wood Jones was the wife of Daniel Spaulding Jones. The contract, however, was made with the latter. The trust was to pay to Kate Wood Jones, the wife, or to her legal representatives, the amount of five hundred dollars within sixty days after the death of Daniel S. Jones. It is a trust then in the Beneficial Endowment Association declared by the husband for the use of his wife, he paying all the consideration, and the contract was with him and not with her. The contract contained a provision that with the consent of the society he might change at any time the beneficiary. He had a right to revoke the interest of his wife and name somebody else as the beneficiary. So that the contract was with him and constantly within his power to change in that respect.

Jones' wife died about two years before he did; and her legal representatives claim the five hundred dollars because the language of the contract was that the money was to be paid to her or her legal representatives.

If there was no question of the legal representatives there could be no doubt at all that this would be a failure of the trust, and therefore it would be an end of it. The resulting trust would take place in favor of Mr. Jones' estate. At section 1200 of Story's Equity Jurisprudence, that doctrine is laid down, and it is a well-established doctrine both as to real and personal estate as to deeds and as to wills. When the object of the trust fails, there is a resulting trust to the grantor. Mrs. Jones dying, it failed as to her, and the question is whether her legal representatives are in any better situation than she was.

In the analogous case of a lapsed legacy, the rule laid down

in the books is this, as I shall read from the first volume of Roper on Legacies, page 466:

"The well-established rule respecting lapse through the death of the legatee in the testator's lifetime, in cases not affected by the above statute will not be varied by the bequest being made to the legatee, his *executors* or *administrators*. For such words are of no importance, inasmuch as those persons would have taken the legacy in succession and by representation, if it had been vested in the legatee, whether expressly named by the testator or not; but since the legatee's death before the testator, prevented his ever taking any interest in the bequest, it follows that his executors or administrators can by no possibility make a title to that which never rested in the testator. This is the principle of the rule, which equally applies to devisees of real as to bequests of personal estate; so that if lands were devised to A and his *heirs*, and he died before the deviser, leaving an heir living at the death of the testator, the heir could not make a title to the estate, because he was intended to take it in succession as representative of the devisee, but which was impossible from the accident of the latter dying before the deviser."

Further, on the same subject, on page 467, the text says:

"Since then a legacy to A, his executors and administrators, will, as we have seen, lapse by his death before the testator, so will a legacy given to A and his *personal representatives*; for in each case the additional words are unnecessary and merely express what the law would have directed if the testator had been silent on the subject, viz., that if A survive the testator (an event which the gift implies since no testator could be supposed to mean to give to any but those persons who shall survive him), and afterwards die before the legacy becomes payable, his personal representative shall receive it. Hence, it appears that the mere naming of the executors, administrators, or personal representatives of A is not inconsistent with the rule before mentioned respecting the lapse of legacies, and does not unequivocally show the testator's intention to sub-

stitute those persons in the place of *A* in the event of *A*'s death before him."

As this is a trust, it is to be construed according to the circumstances surrounding the case. If a man buy a piece of land or other property and takes the title in the name of his son, the presumption will be that it was intended as an advancement to the son. It does not follow necessarily that the title being in the name of the son, the son shall have it. The father may have intended it as an advancement. But the courts will receive evidence upon that subject whether it was intended as an advancement or not, and if it was not intended as an advancement then the father would have it because he paid the money.

So, in looking at these questions of trust, the court will consider all the surrounding circumstances of the case, and when proper and necessary it will receive parol evidence for the purpose of ascertaining the intentions of the parties. In this case we think that no parol evidence could have made the case any clearer than the circumstances upon the face of the transaction. The beneficiary was the wife of Daniel Spaulding Jones. He intended to leave this for her benefit after his death. The fact that she survived him was a fact which he had no contemplation of at the time. The paper did not provide for what did happen, and there is nothing in the case to show that there was any person who could take from her, or who was considered by him in the matter as taking in case of her death because she had no children, she had no distributees, no near relations. There is no evidence at all to show that there were any persons in the relation of distributees to the wife in whom he felt any interest at all.

So that we are obliged, from all the circumstances, to come to the conclusion that this trust was a trust intended for the wife alone, and that the words "legal representatives," as here used, have no signification different from that which is attributed to those words generally in the law; that is persons appointed, either by will or by the law, to administer upon her estate after her death. That being

the view of the court, we think that her legal representatives could not possibly take anything in this case, because she herself died before the intestate, her husband, and there was a failure therefore of the trust. The fund, therefore, resulted to the husband, and his estate is entitled to the money.

The decree below is affirmed.

The Chief Justice said:

I cannot give my consent to the precedent here established.

Here is a clear expression of the intention of these parties in the policy itself. The undertaking is to pay this woman or her legal representatives the amount of money stipulated in this policy. The beneficiary of the trust or of the contract dies. That ended it as far as she was concerned. Her legal representatives survive, and this estate must be taken out of their hands by construction.

Now, if the insured had not lived two years after his wife's death with the power to reappoint, and if he had not failed to exercise it as he might have done, there would be stronger equitable reasons that would lead us to divert this fund from her representatives to his. But if anything is to be argued from his conduct it is that he affirmed the disposition of this insurance money contemplated in the contract. It is not like the case of a lapsed legacy where a testator wills his estate to a given object and that object disappears before he does. In that case the representatives are an incident to the estate created in the devisee. They only have an existence in that incident, and it would be promoting the incident to assume that they could inherit or could receive what the ancestor could not. This is a direct contract of the underwriters of this party, with a power in the procurer of the agreement to assign it to a different use which he did not see fit to do during his lifetime. And while I think that my brothers have followed a pretty fair equitable disposition of the matter, for the fund is doing as much good in one direction as in another, I think they are doing it with violence to this contract.

Mr. Justice James said:

The contract was made between the assured and the company or association having one object in contemplation, the naming of a beneficiary; and, as Mr. Justice Wylie has said, I think that the designation of the legal representatives cannot be construed to be the designation of a new party to come in succession. The fact that her legal representatives are named afterwards does not indicate that they are to take as beneficiaries successively nominated. Clearly on the face of it it is but a single designation, and that is to the wife.

## WESTHAM GRANITE COMPANY

vs.

CHANDLER ET AL.

EQUITY. No. 7483.

{ Decided April 6, 1885.  
{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. It is not in the power of a creditor to divide up his claim without the consent of the debtor, and apportion it out so as to give each of the assignees a right to sue him. If the latter chooses he may disregard all such partial assignments and pay the money to the original creditor.
2. A present executed assignment of part of a claim bears interest if the claim also bears interest, but it is otherwise where the assignment is intended to be executory only.

## STATEMENT OF THE CASE.

Complainants were judgment creditors of William J. Murtagh, and the bill was filed to subject numerous equitable interests (alleged to be Murtagh's property) both in real and personal estate to the satisfaction of their judgments; and a large volume of testimony was taken in respect to these various interests.

Among the properties thus sought to be subjected was the accretion of interest upon the principal sum of a judgment which Murtagh had recovered against the District of Columbia, but of which, and while the suit was pending, he had made certain assignments; the first, a partial one to George Hill, jr., and the second, apparently of the whole, to William E. Chandler. These assignments appear in the opinion. The suit was vigorously contested, so that it was not until the 14th of July, 1880, that it was collected by Enoch Totten, esq., attorney of record for W. J. Murtagh; and the sum collected was of both principal and interest from August, 1875.

Hill, jr., claimed the right to receive from Totten not only the sum of \$10,600, the principal of the sum assigned to him, but also interest thereon from the date of his assignment until the payment, namely, from March 24, 1876, to July 14, 1880. Chandler claimed the whole of the judgment after the payment to Hill, jr., of the \$10,600, while



Murtagh's creditors claimed that the principal sum only should be distributed to Hill, jr., and Chandler, and that the accrued interest should be applied to the satisfaction of their judgments.

Totten paid to Hill, jr., \$10,600, the principal sum of his assignment, another amount to Chandler, and retained in his possession the interest until it should be decided to whom it should be paid as between Hill, jr., Chandler and the complainants.

The court below decreed that Hill, jr., was not entitled to have interest upon the \$10,600 and ordered its payment to Chandler, from which decree Hill, jr., appealed.

M. F. MORRIS and W. J. MILLER for complainants.

W. D. DAVIDGE and FRED W. JONES for Hill, jr.

GORDON & GORDON for Chandler.

Mr. Justice WYLIE delivered the opinion of the court.

William J. Murtagh, in the year 1874 or 1875, was the plaintiff in an action against the District of Columbia for the recovery of a large sum of money which he claimed to be due him on a contract. Whilst that suit was pending and on the 24th of March, 1876, this paper was filed in the cause, omitting the titling:

"The clerk of the court will enter the above suit and case for the use of George Hill, junior, to whom I have assigned, and do here assign the same to the extent of \$10,600.

"WILLIAM J. MURTAGH.

"Witness: "CHARLES DOUGLASS."

And the paper is marked as filed on the same day. Subsequently, in the same case, the following paper was signed, omitting the titling:

"The clerk will docket this case for the use of William E. Chandler.

"WILLIAM J. MURTAGH.

"ENOCH TOTEN,

*"Attorney for Plaintiff."*

That paper was filed on the 2d of March, 1877, nearly a year subsequent to the execution and filing of the first paper which I have read, and the controversy is over a part of this fund between these claimants.

Subsequently to the filing of these assignments the case was tried, and judgment was rendered in favor of the plaintiff for something over \$20,000. By consent of all parties interested, the whole amount of that judgment was placed in the hands of Mr. Totten who was the attorney for Murtagh in the case, and the parties in interest are here claiming their respective rights to that fund.

The District of Columbia is out of the case altogether.

It has, by an unquestionable assent, permitted the fund to be distributed by this court at law and in equity also. Unless the defendant who holds the fund in controversy assents, assignments of this kind are utterly void. No man consents when he comes under obligation to another that that other may divide his claim up into half a dozen parcels, and give each assignee a right to sue him. He has a right to say, "I will pay what I owe in one sum; that is my contract." These partial assignments, therefore, are utterly worthless, both in law and equity, unless the debtor assents to them. But after he has given his assent he is bound by it, and the court will then undertake to decide the rights between the different assignees. This doctrine is fully laid down in the case of *Mandeville v. Welch*, in 5th Wheaton, and the whole subject is discussed in 3d Leading Cases in Equity in a note to the case of *Rowe and Dawson*, beginning at page 337.

We do not think this case calls for much discussion upon that subject. The doctrine is laid down very clearly that it is not in the power of a creditor, without the consent of the debtor, to divide up his claim and apportion it out so as to give each of the assignees a right to sue him. If he chooses he may disregard all such partial assignments and pay the money to the original creditor. But that question does not arise here for the reason that both the District of Columbia and Murtagh have given their consent that the

parties claiming their respective interests in this fund shall have them without any question as to the right of the title to the fund to be made in the case. All the papers show such a consent on the part of both of them, Murtagh by his assignment, and the District of Columbia by putting moneys into the hands of Mr. Totten for the use of such parties as may be entitled to them.

The question on Mr. Hill's assignment is this: Whether this is a present assignment of \$10,600 of that claim at that time, or whether it was a contract executory in its nature that he should be paid \$10,600 when the fund was realized. In other words, and in as succinct terms as I can express it, the question is, whether this is an assignment of so much of the claim—of \$10,600 out of all of the claim—or whether it was an assignment of \$10,600 of the claim. Had it been an assignment of \$10,600 out of the claim, then of course Hill would have no right to anything beyond his \$10,600. But if it was an assignment of \$10,600 of the claim, then he was the owner of that much in that claim from that time forward. The language of this paper is:

“The clerk of the court will enter the above suit and case for the use of George Hill, junior, to whom I have assigned, and do hereby assign the same to the extent of \$10,600.”

We think that that paper was at that time a present assignment of \$10,600 of that claim. The \$10,600 has been paid to Mr. Hill—just the principal. But the question here is concerning the interest. The action of law went on and was tried, and the verdict of the jury was for twenty thousand and some hundred dollars with interest from some date in August, 1875, until paid.

Now, if the claim itself bore interest then every part bore interest, and if we are right in our position that Hill had an assignment of \$10,600 as a present interest in that much of the claim, why then that, being a part of the claim, the whole claim bearing interest, is, of course, entitled to its proportion of the interest. We do not see how it is possible to avoid this conclusion.

It was very earnestly contended in the court below by counsel for complainants, (and very candidly too, but it showed that he understood the pressure of these views when he was arguing the case), that this paper constituted nothing but an executory contract. Well, if that was so, in point of equity his position was right. If that was an executory contract then Hill was entitled only to \$10,600, and there is some appearance of authority for his position. I read from 3d Leading Cases in Equity, at page 337, on that subject, where it is said:

"Every assignment of a chose in action is merely an executory contract which equity considers as executed, and which the law, following equity, regards as conferring certain rights which the assignee is bound to respect."

And he cites authorities and discusses the subject. The amount of it is this: That a court of law which disregards these assignments, treats them as null, yet will go so far as to hold them to be contracts binding the parties. It is not binding in any other way, but it is binding between the parties. Therefore a court will hold the parties not to the contract as expressed, for that is forbidden in their opinion as a present assignment, but as an executory contract it binds the parties to do afterward what is to be done. But at the same time a court of equity, which always regards a thing as done which ought to be done; a thing as executed which ought to be executed, comes to a different conclusion, and it has always been the practice in equity to sustain these assignments of choses in action where the chose in action arises out of a contract. A man cannot assign to another a chance for the recovery of damages for a broken leg, or the seduction of his wife or daughter. But where the chose in action arises out of a matter of contract, it is assignable in equity, and it is assignable presently, and will be so construed. And this is a matter before us under our equity jurisdiction.

We are bound then to interpret this assignment according to its plain terms, and that is what the law calls a partial assignment of a claim. It is true, as I have said, that

all the parties in interest have a right to object to a partial assignment. But having assented, as has been done in this case, there is no difficulty from that source, so that we are of opinion that this paper was at its date—March, 1876—a present assignment of \$10,600 to Mr. Hill, and as the whole cause of action was bearing interest, it necessarily follows that his \$10,600 bore interest also; but that of course no interest can be allowed subsequently to the deposit of the money in the hands of Mr. Totten.

The Chief Justice dissented.

## IN RE PHILIP S. WALES.

{ Decided April 15, 1885.

{ Justices WYLIE and JAMES sitting.

1. An order directed by the Secretary of the Navy to a subordinate, commanding him to confine himself within certain limits is not such a restraint of personal liberty as will be reached by a writ of *habeas corpus*; the party is not under restraint, except so far as he chooses to obey the order.
2. In a *habeas corpus* proceeding the power of the court to look into the validity of an order of arrest is incidental to the inquiry into the lawfulness of an actual imprisonment; if the court find no imprisonment it has no power to examine into the validity of the order.

Application for a writ of *Habeas Corpus*.

THE CASE is stated in the opinion.

J. M. WILSON and F. P. B. SANDS for petitioner.

JOHN S. BLAIR for respondent.

Mr. Justice JAMES delivered the opinion of the court.

The petitioner shows that he is the Medical Director of the United States Navy and it appears that the Secretary of the Navy issued to him the following communication and order:

“WASHINGTON, February 26th, 1885.

“SIR: Transmitted herewith you will receive charges and specifications preferred against you by the Department.

“A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock, noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear-Admiral Edward Simpson, U. S. Navy, the presiding officer of the court, for trial. The judge-advocate will summon such witnesses as you may require for your defence.

“You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington.”

The return of the Secretary of the Navy states:

“That the said Philip S. Wales is not now, nor was not

at the time of issuing the annexed writ, in the custody or possession of or confined or restrained of his liberty by your respondent, other than appears by the papers marked A, B and C attached hereto and made a part of this return, and that the cause of such detention, if any there be, is fully shown in said exhibits."

In other words, it appears that what is characterized as a restraint of liberty in this case, was exercised only by the order which I have just read.

The question presented is, whether the petitioner is under that kind of restraint for which the writ of *habeas corpus* is the proper remedy. What is meant by the statement, "You are placed under arrest?" The army regulations show that that is a military phrase which does not import close confinement. The order itself, however, without the assistance of the explanation which may be drawn from the regulations, defines precisely the character of the restraint. It is that the arrest consists of *confining himself* in his movements to the city of Washington.

Authorities were cited to us to the effect that words could constitute an imprisonment; but nothing of the kind was decided by these cases. It was only held that where an officer, having the power to make an actual, physical arrest, presented himself to a person and told him, "I arrest you," then the words imported that the officer took possession of him. The words did not constitute a deprivation of liberty, but were simply proof of the nature of the officer's conduct. His presence and demeanor were explained by what he said, and his presence and demeanor, not the words, had the effect to deprive the party of his liberty.

Here we have an order which simply informs the party that he shall confine himself to the limits of the city of Washington. As a matter of fact he could go where he pleased. His liberty is not restrained, except as he chooses to restrain himself by complying with the order rather than incur the consequences of disobeying it. If he is confined to the city of Washington, he confines himself. That, we think, disposes of the whole question. Dr. Wales is not

under restraint except so far as he chooses to obey a military order. He can disobey it at any moment and leave the District as freely as any person in the District can do so. He prefers to stay rather than incur the possible penalty of disobedience. In short, it is shown by his own petition that he is not under that kind of restraint from which a writ of *habeas corpus* will deliver a person. That writ contemplates actual, physical restraint.

With this view we have not thought it proper to examine into the validity of the order of arrest. Our power to look into that subject is incidental to the inquiry into the lawfulness of an actual imprisonment. If we find no imprisonment we have no power to examine the validity of the order.

There is another very good reason why we should not do so. If the petitioner should actually be deprived of his liberty and imprisoned under the sentence of the court-martial referred to, this court could be called upon again to look into that question; and it is not proper, as we think, to intimate any conclusion in anticipation of any such possible result.

Mr. Justice WYLIE. I wish to say just one word. The writ of *habeas corpus* will only lie for the purpose of restoring to liberty a man who has been unjustly imprisoned, and I suppose the proposition cannot be denied that, unless an action for false imprisonment could be maintained against the party who has done the act in question, the writ of *habeas corpus* will not lie in behalf of the person who is subjected to the proceedings. It is very clear, I think, that no action for false imprisonment would lie on behalf of Dr. Wales against the Secretary of the Navy for his order. If he could not maintain an action for false imprisonment, then he has not been imprisoned in such a way as to give him the benefit of *habeas corpus*.

On that subject I will read a few lines from Selwyn's *Nisi Prius*, page 915:

"False imprisonment is a restraint on the liberty of the



person without lawful cause; either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets against his will." For this injury an action of trespass *vi et armis* lies, usually termed an action for false imprisonment.

In a note to that there is a reference to the opinion of Judge Baldwin in the case of *Johnson v. Tomkins*, reported in 1 Baldwin, 601, which it appears to me is directly in point in this case:

"It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested, if he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his own option to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand, ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention or restraint of the freedom of his motion, he is as much imprisoned as if his person was touched or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease and the means of effecting it are removed."

But the presence of some sort of physical force to restrain the man of his liberty is always necessary to constitute the imprisonment. A mere moral force is not sufficient for the purpose. In the present case the consequence of the violation by Dr. Wales of this order is that, under the articles relating to the navy, he would lose his office. He can go if he chooses, but he would lose his office. That is the penalty. That is a moral influence. It is not the presence of physical force.

I have my doubts upon the other point, as to the power of a court-martial to try a man for negligence in the per-

formance of his duties in connection with a bureau of the department, though I do not wish to commit myself upon that subject.

Mr. WILSON: We desire to test this question further as to whether this is an arrest such as a party can be delivered from by writ of *habeas corpus*. I suppose the ruling of the court will be that the demurrer, as filed, is overruled.

Mr. BLAIR: It occurs to me that the better judgment in the case would be to dismiss the writ. The overruling of the demurrer will hardly answer.

Mr. Justice JAMES: If my brother Wylie concurs, we will overrule the demurrer and dismiss the writ.

Mr. Justice WYLIE: That will be the order.

THE FIFTH BAPTIST CHURCH OF WASHINGTON CITY, D. C., BY  
ITS TRUSTEES,

vs.

THE BALTIMORE & POTOMAC RAILROAD COMPANY.

LAW. No. 21,760.

{ Decided April 27, 1885.

{ The CHIEF JUSTICE and Justices WYLIE, COX and JAMES sitting.

Under section 535 of the Revised Statutes of the District of Columbia, a recorded certificate of incorporation of a religious society is not evidence of a corporate organization unless it state the date of the election or appointment of the trustees; the length of time for which the trustees were elected or appointed, and is verified by an affidavit by one of the persons making the certificate. Without these particulars it is not the paper which the law provides for as sufficient proof of corporate organization, for if a paper be placed on record which is neither directed or authorized to be recorded, the record is no evidence of the existence or contents of such original paper, and still less of any facts set forth, recited or declared in such paper.

THE CASE is stated in the opinion.

J. J. DARLINGTON and R. T. MERRICK for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice Cox delivered the opinion of the court.

The case of the Fifth Baptist Church against the Baltimore & Potomac Railroad Company, is a second action for damages for the continuance of an alleged nuisance to the property of the plaintiff, for which a prior action was brought and a judgment recovered. The suit is brought in the name of the Fifth Baptist Church of Washington, D. C., by its trustees. The declaration commences by stating that—

“The plaintiff is a body corporate in the District of Columbia, under and by virtue of the general act of incorporation of the Congress of the United States, approved the 5th day of May, A. D. 1870.”

The first plea filed in this case was:

“That the said plaintiff was not, at the time of the com-

mencement of this suit, and never was, a body corporate or politic as set forth and alleged in and by said declaration."

When the plaintiff rested, the defendant by its counsel prayed the court to instruct the jury to render a verdict for the defendant, on the ground that the plaintiff had failed to prove that it was a corporation as alleged, and to further instruct the jury that the defendant was entitled to judgment upon the first, fourth and fifth pleas, which motion the court overruled and denied. This was the principal issue in the case, and the one which raised the only serious question of law in the case which had not been decided in the former action.

It appears by the evidence that as far back as June and July, 1863, the ground on which the Baptist Church was erected had been conveyed to certain parties as trustees of the Island Baptist Church. To sustain the affirmative of this issue on the part of the plaintiff, the following paper was offered in evidence:

*"Incorporation Charter of the Fifth Baptist Church, Washington, D. C. Recorded, September 5, 1871, 11 a. m.*

"We, C. C. Meador, George M. Kendall [and others whom it is unnecessary to name here] do hereby certify that we have been duly elected 'trustees of the Fifth Baptist Church, of Washington, D. C.' (commonly called 'the Island Baptist Church'); and that this certificate is made, signed and sealed for the purposes of obtaining corporate rights and privileges for the said Fifth Baptist Church, a religious society worshipping at present in their church edifice on D street south, between Four-and-a-half and Sixth streets, in said city of Washington, under the provision of an act of Congress approved May 5, 1870, entitled 'An act to provide for the creation of corporations in the District of Columbia by general law.'

"In testimony whereof, we hereunto set our hands and affixed our seals this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and seventy-one."

This is signed and sealed by the parties, and acknowledged before Edmund F. Brown, a notary public, and certified to be a true and verified copy of a certificate of incorporation, and the whole of the same, as recorded in Liber No. 1, folio 153 *et seq.*, "Acts of Incorporation for the District of Columbia," by George F. Schayer, deputy recorder.

The defendant's counsel objected to this as evidence of incorporation under the law, upon the ground that it was not the paper that the law directs and allows to be recorded. On looking at the Revised Statutes of the District of Columbia, we find in section 535, under class 2, in regard to these societies, that:

"The persons elected or appointed as trustees shall immediately thereafter make a certificate under their hands and seals, stating the date of their election or appointment, the name of the society or congregation, and length of time for which they were elected or appointed, which shall be verified by the affidavit of one of the persons making the same, and shall be filed and recorded in the office of the recorder of deeds of the District."

This certificate does not state the date of the election or appointment of the trustees. It does not state the length of time for which the trustees were elected or appointed, and it is not verified by affidavit, but is simply acknowledged before a notary public. It does state the name of the society. So that it only complies with one out of four requisites prescribed by the law, to make it a complete and valid certificate of incorporation.

The answer made to this by the plaintiff is two-fold. First, it is claimed that the making and filing of this certificate of incorporation is not by the law made a condition precedent to the incorporation, but that the provisions of the statute in that regard are purely directory.

In looking at the law, we find that it contains provisions in reference to different classes of incorporations. For instance, boards of trade and cemetery companies are not required to file any certificate at all, but upon the mere

election of trustees they are thereupon made bodies corporate. Trading and manufacturing corporations, on the other hand, are required to file a certificate; and it is provided that on the filing and recording of such certificate, they shall become a body corporate, and shall have such and such powers. In respect to religious societies it is provided that they may purchase or receive by gift a quantity of land, may assume a name, and may elect or appoint any number of trustees, not exceeding ten, who shall be styled trustees of such society or congregation. Then these trustees are directed to make and file this certificate, stating the date of their election or appointment, the name of the society or congregation, and the length of time for which they were elected or appointed. After these directions, it is said:

"Such trustees and their successors shall have perpetual succession and existence," &c.

But it is not said that upon the filing of the certificate, the trustees shall have this perpetual succession, &c., nor is there any other language which makes this a duty essential to the incorporation of the society. That is one answer. And it is claimed, therefore, that the provisions concerning the election or appointment of trustees, and the other formalities specified in section 535, are purely directory and not prerequisite to the grant of corporate power.

Another answer is, that even if the filing of this certificate is made a condition of the corporate existence of the society, still if it be shown that a colorable organization was effected, and it is further shown that the body has since exercised and used corporate privileges and powers, that this is sufficient to make out a corporation *de facto* as regards third persons, notwithstanding a failure to prove a compliance with the conditions and requirements of law, although, in a proceeding directly by the Government, it would not be sufficient to establish a corporation *de jure*.

Certain acts of user of corporate powers were referred to. That is to say, certain conveyances were offered in evidence made to or from the Fifth Baptist Church *eo nomine*, and this was supposed to establish a user of corporate privileges.

There is a manifest difference between a special act of incorporation and a general act of incorporation such as we have in force here. If a special law incorporates certain individuals by name, and they can show that they have subsequently exercised corporate powers, i. e., acted as a corporation, the authorities have held that, as against third persons, that is a sufficient evidence of a corporation *de facto*, notwithstanding a failure to comply with some of the conditions of the law. It would not be sufficient to show a charter to certain persons which required certain acts to be performed in order to amount to an organization under the charter, without going further. Nor would it be sufficient to show that any body of men had simply called themselves a corporation and assumed to act as such, without showing a charter.

Where there is a general incorporation act, it would be equally insufficient for any body of men to show that they had simply been acting as a corporation, without going further and showing some authority to do so. Nor would it be sufficient in addition to that to show or to offer in evidence, or invite attention simply to the fact that a general act of incorporation was in force in the jurisdiction. It would be necessary further to show that that general act of incorporation had become the special charter of these individuals in some way or other in order to make out a case of a corporation *de facto*. In order to do that, it is necessary to show some steps taken towards an organization under the general incorporation act. Whether a mere tentative or colorable organization, supported by proof of user, would be sufficient, has been discussed here with considerable ability and show of authority, and it is a question upon which there may be a difference of opinion.

But the trouble here is that, apart from this certified transcript offered in evidence, there is nothing in the case, no evidence *aliunde*, to show that this religious body ever elected any trustees in order to get the benefit of this act, which is the very first step towards a corporate organization, or that any other thing was done towards this end.

The controversy, therefore, is reduced to this question, whether the paper offered in evidence here is, in itself, sufficient proof of corporate organization. I have already stated that this paper is not the paper which the law directs to be recorded. It complies with only one out of four particulars which the law prescribes for such a paper.

If there is anything well settled, it is that, if a paper be placed on record, which is neither directed or authorized to be recorded, the record is no evidence of the existence or contents of such original paper, and still less of any facts set forth, recited or declared in such paper. This certified copy of the certificate appearing on the land records is, therefore, no evidence that there ever was any such paper executed, and is no evidence that there ever was an election of trustees for the obtaining of the benefits of the acts of Congress. Consequently, the record is barren of any evidence whatever tending to show the incorporation of this religious society under the general incorporation act, and the counsel below was right in asking the court to instruct the jury to find a verdict for the defendant, on the ground that plaintiff had failed to prove that it was a corporation, and that application being refused, there was error, and therefore a new trial must be granted.



## SOLOMON P. GIDDINGS vs. JOSIAH H. SQUIER.

LAW. No. 25,862.

{ Decided April 6, 1885.  
{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

Where property has been attached under a writ of attachment regularly issued on the ground that the defendant evades the service of ordinary process, judgment of condemnation should be rendered, although it appear that service of process was afterwards obtained on the same day, unless the defendant obtain an order quashing the writ, or supersede it with surety as provided by the statute (R. S. D. C., §§782-786.)

## STATEMENT OF THE CASE.

This was a suit at law instituted on the 9th of June, 1884, to recover \$4,285.

The plaintiff filed his declaration, and at the same time affidavits of himself and a witness proving the debt, and averring "that the defendant evades the service of ordinary process by concealing himself," accompanying the declaration and affidavit was the usual undertaking to make good all costs, etc., whereupon a writ of attachment was issued, which was served on the same day. Later, on the same day, the summons was served on the defendant in person.

More than twenty days having elapsed, and no plea having been filed, motion was made for judgment of condemnation of the property attached. The court below refused this motion, upon the ground that it appeared from the marshal's return of personal service of process, that, in point of fact, the defendant was *not* evading the service of process, but directed a judgment by default for the amount claimed in the declaration, with costs.

The plaintiff appealed from so much of the judgment as overruled the motion for a judgment of condemnation.

FRED. W. JONES, for plaintiff, cited Rev. Stats., §§ 782, 783, 784, 785 and 786, also 16th rule of court.

The proceeding being *in rem* with defendant in default, he was not represented.

Mr. Chief Justice CARTTER delivered the opinion of the court.

I have to express the opinion of the court in the case of Giddings against Squier. The record sets forth an application to the clerk for an attachment, the filing of a bill of particulars amounting to \$4,285, an affidavit that the defendant evades ordinary process by concealing himself, proof of the indebtedness and how it arose, by the testimony of George W. Stickney, an undertaking by the attaching creditor as provided by the statute, approved by the clerk, and the marshal's return of the writ of attachment as follows:

"I, Clayton McMichael, U. S. Marshal for the District of Columbia, do hereby certify that I have this 9th day of June, A. D. 1884, attached all the defendant's right, title, interest and estate in and to the following described property in the city of Washington, to wit: In square 199, lot A, north part, beginning at N. W. corner; south, 98 ft. 1 in.; east, 29 ft.; north, 7 ft. 7 in.; west, 2 ft.; north, 90 ft. 6 in.; west along K street, 27 ft., together with improvements thereon.

"CLAYTON McMICHAEL,  
"U. S. Marshal."

Personal service was also had.

"Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 9th day of June, 1884.

"CLAYTON McMICHAEL,  
"Marshal."

July 14, plaintiff moved for a judgment of condemnation of the property attached by the marshal, which was overruled and judgment by default given for the amount claimed in the declaration. An appeal was taken from the judgment overruling the motion for condemnation.

The record in this case exhibits a proceeding in attachment accurately conforming to the requisites of the law. A

motion for condemnation of the property under the attachment was made and denied, and a judgment rendered *in personam* against the defendant, and the case stands there. There was no motion to quash the attachment. There was no substitution of security to relieve the property and stand in its stead, nor was there any other interference of any sort by the defendant. So that the case raises simply the question whether a judgment of condemnation of property, where personal service may have afterwards been made, can be rendered.

The old idea of this process was evidently predominant with the court below. Then, attachment was merely a process for the purpose of securing the presence of the defendant, and, upon his appearance, it was discharged, and the matter was resolved into a proceeding *in personam*.

There was another view, perhaps, taken of it which is suggested by a possible circumstance, and that is, that there is an incongruity in service of process upon a debtor's property by attachment for the reason that he cannot be found and is evading process, and on the same day obtaining a personal service upon him. There is an apparent incompatibility in that state of facts; and if one hour did not follow another, if noon did not follow the morning, and night the noon, and if the man could not be found between extremes in a service of an attachment transpiring in the early part of the day and personal service in the after part of the day, it would be irreconcilable. But such a thing is quite possible, and, more than that, it frequently occurs. It very often happens that the man who cannot be found just before the service of an attachment is very oppressive in his presence just afterwards.

But what does the statute mean? It is to be found embodied in sections 782 to 786 of the Revised Statutes of the District. After providing the terms under which the attachment may issue, it says:

"SEC. 783. "If the defendant, his agent or attorney, shall file an affidavit traversing the plaintiff's affidavit (that is the preliminary affidavit) the court shall determine whether the

facts set forth in plaintiff's affidavit are true, and whether there were just ground for issuing the writ of attachment; and if the facts do not sustain the affidavit, the court shall quash the writ of attachment or garnishment, and this issue may be tried by a judge at chambers on three days' notice."

If the attachment is quashed this is the end of the proceeding. But there was no motion to quash in this case. There was no controversy about the facts. The proof was, that the defendant was evading process, and there was no proof to the contrary.

The statute continues:

"SEC. 784: The thing attached shall not be discharged from the custody of the officer seizing it until the defendant shall deliver, either to the officer or to the clerk, to be filed in the cause, his undertaking with sufficient surety to satisfy and pay the final judgment of the court against him."

No surety was given, none tendered, and here is the mandate of the statute directing the court that they shall not discharge the property without it. The writ is good, the proceeding is regular and according to law. What is next to be done under these circumstances?

The next section—sec. 785—provides:

"If the defendant fail to execute such undertaking, the court may sell the thing attached; whenever it is satisfied that it is in the interest of the parties, it should be sold before final judgment."

So that if the attachment is not quashed, if no substitutional surety is given, the court is to sell it in the interests of the parties.

The court below refused to enter a judgment of condemnation of the property, although there was no motion made to quash the attachment or to supersede it with surety. The condemnation was probably refused under the presumption that the defendant was served with personal process before the service of the attachment. But that is not a presumption to be entertained at all; it is a matter

of proof, or would have been on a motion to quash the attachment.

We think that the property was subject to condemnation, and that the court ought to have entered such a judgment and have directed a sale of the property in the interests of the parties.

Judgment will be entered condemning the property and awarding execution.

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SAMUEL STRONG v. THE DISTRICT OF COLUMBIA.

LAW. Nos. 14,706 and 14,786.

{ Decided April 27, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. Where a cause is referred to referees by stipulation of counsel, the provisions of the stipulation, in regard to objections which may be taken by the parties to the award, will control the court in examining the award.
2. Where by such a stipulation it was provided that either party shall have thirty days after notice of the filing of the award, within which to file "motions as respects findings of fact, or rulings upon questions of law, or upon the admission or rejection of testimony as might have been made if the case had been tried by a jury and a verdict rendered": It was *held* that this language included all of the necessary or appropriate methods of reaching such errors of law, and therefore the method adopted by filing exceptions to the award was appropriate and sufficient if filed within the thirty days.

THE CASE is stated in the opinion.

B. F. BUTLER, W. A. COOK and FRANK T. BROWNING for plaintiff.

A. G. RIDDLE and FRANCIS MILLER for defendant.

Mr. Justice JAMES delivered the opinion of the court.

The case of Samuel Strong against the District of Columbia is before us on a motion to strike out certain exceptions to an award.

An action at law was brought by Strong against the District of Columbia on certain contracts between them. By an order of the court, made with the consent of the parties, the case was referred to three gentlemen, Messrs. William Penn. Clarke, Halbert E. Paine and Edward Clark, to examine the facts, report thereon and make an award. This was done upon a stipulation signed by the counsel for the parties respectively. The stipulation was in the following words:

"It is this twenty-fourth day of May, 1883, hereby stipulated and agreed, by and between counsel for the respective parties hereto, with the consent of the plaintiff and the defendant, that the above entitled causes shall be referred to William Penn. Clarke, Halbert E. Paine and Edward Clark, who shall take and hear the testimony of the respective parties hereto and have the same reduced to writing, which shall, together with all their rulings upon points of law and the admission and rejection of evidence, be made of their findings—of law and of fact to be stated separately—and, upon the hearing of all the evidence, they shall render an award, which shall be filed in the Supreme Court of the District or the clerk's office thereof, with notice to both parties or their attorneys, and it shall have the same effect as a verdict of a jury; and the said award, together with the evidence and the rulings of the said William Penn. Clarke, Halbert E. Paine and Edward Clark, on questions of law and on the admission or rejection of testimony, shall be made a part of the record in these causes.

"The said award, after it is rendered, shall be subject to such motions as respects matters of fact by either party as might be made if the causes were tried by a jury and a verdict rendered thereby, and also to be set aside by the Circuit Court of the District of Columbia for any error of law which may arise in said cases, and be passed upon by said William Penn. Clarke, Halbert E. Paine and Edward Clark, with the right of appeal to either party to the court in General Term and to the Supreme Court of the United States; and, upon final hearing and determination of the award in

the circuit court of said District, a judgment shall be entered thereon which shall have the same effect as if the cases had been regularly tried by a jury and a verdict rendered.

"The party in whose favor the award shall be made, or the attorney of such party, shall give to the adverse party, or its attorney, thirty days notice of the filing of the award, during which time either party may file any motions as respects findings of fact, or rulings upon questions of law or upon the admission or rejection of testimony, made by said William Penn. Clarke, Halbert E. Paine and Edward Clark, as might have been made if the cases had been tried by a jury and a verdict rendered as hereinbefore provided.

"And the said William Penn. Clarke, Halbert E. Paine and Edward Clark, in their findings, shall state the amount legally due to or by the plaintiff under each of the several contracts sued on, and the extra work thereunder or for overpayment thereon, if any, and shall make a final award of the amount due upon them all, either to the plaintiff or defendant. And it is further hereby stipulated and agreed by and between the counsel for the respective parties hereto, by and with the consent of the plaintiff and defendant, that the testimony heretofore taken in the above entitled causes before special auditor Eugene Carusi, esq.—"

That part is immaterial, however, to what we have here to dispose of.

It was insisted, on the part both of the plaintiff and of the defendant, that the questions at issue upon these motions were governed entirely by the stipulation, and that the parties must be held to that. We therefore examined with the more care the terms of this stipulation. It provides first how the referees are to proceed; next, the effect of their action, and thirdly, how that action may be attacked. As to their mode of proceeding it provides that they shall take the testimony in writing and make that a part of the record, so that the court shall know the basis upon which the findings of fact and of law rested. Also that they shall exhibit to the court, in the record which is to be returned

their decisions in admitting and rejecting evidence, and that they shall make their findings of fact from step to step and their findings of law distinctive. Then they shall make a finding, or it may be called an award, upon each contract. They are to ascertain and find the amount due to the plaintiff upon each one, and then, putting all these amounts together, make a final award of the whole sum due.

Then it is provided that this award shall be subject to motions as respects matters of fact in the same manner that a verdict is subject and upon the same grounds. And secondly, that the award shall be subject to be set aside by the circuit court for any error of law which may arise and be passed upon by these referees.

The time during which motions shall be made was limited to thirty days from the notice given by the successful party to the other party of the award. It appears that quite within that period the defendant filed numerous exceptions. The first point made on the part of the plaintiff, therefore, was that there was no authority in this stipulation to file exceptions, and that is the first point we shall consider.

It is provided not only that the award shall be subject to such motions as respects matters of fact by either party as if the cases were tried before a jury and a verdict rendered, but also that it shall be subject to be set aside for errors of law. That includes all of the necessary or appropriate methods of reaching these errors of law. It is contemplated by this stipulation, when we come to apply its operation, that the attack upon errors of law may be by exception; because that is one of the appropriate methods of reaching an error at law. This stipulation, therefore, by implication, fairly provides for objections to errors of law in the form of exceptions or in any other appropriate form.

It was said, however, that, inasmuch as this stipulation did not mention specifically the filing of exceptions, they must be filed, if at all, according to the Maryland act which is in force in this District providing for the reference of causes at law to referees, and therefore should have been filed within seven days. But as the exceptions may be



made the appropriate ground for motions which may be filed, it follows that they may be filed at any time within the thirty days if they are the basis of the motion. These exceptions, therefore, if allowed to be filed at all, were filed quite in time if filed within the thirty days.

It was next said that the exceptions, however, did not constitute of themselves motions, and that no motion was made upon them until it was too late.

The form in which these exceptions were presented to the court is shown at the end of them in this case. After setting forth a list of the exceptions, or, as we would call them, objections to the errors of law, and pointing out what the errors of law were, the paper closes in these words:

"The defendant, for reasons set out in the above exceptions by it taken to the findings of law and fact by said referees and to their award, asks the court to set aside the same and declare and adjudge the same as void and of no effect, and remand the case for further proceedings."

The word "motion" is not there employed, but we do not understand that this right of moving for the vacating of an award or the setting aside of it, depends upon the use of phraseology. This prayer or request or whatever it is, is a motion, in our opinion, to set aside that award. The reasons for it have been recited. The point here is, that for the reasons hereinbefore recited, the defendant asks the court to do this. That is just as good as if he had used the words, "moves the court to set aside," and it is a motion just as clearly as if it had begun with that statement, "moves the court to set aside the award for the reasons hereinafter recited." The reasons are coupled with the motion. We must hold therefore that a motion in contemplation of this stipulation was made to set aside this award on the grounds recited in these exceptions, and that they were within the time.

It was said, however, that the exceptions, when they came to be inspected, were not such in any case as could be heard when a case had been referred to referees. But this stipulation provides for the entire presentation to a reviewing tri-

bunal of the facts of the case and of the rulings of the referees upon the facts; their rulings in admitting or rejecting testimony or their findings of law; in other words, of every detail in the steps by which they arrived at their conclusion. It provided distinctly for objections to the finding that the referees made in their character of jury, and it recognizes the fact that they had two capacities; that they were to find the facts as a jury, and they were to find the law. But it distinctly indicated that neither of these should be absolutely conclusive. It opened their conclusions as to fact to the re-examination of the court to the same extent that a verdict of a jury would be re-examined. It opened the questions of law without any limitation, for there could be none.

This stipulation therefore is its own law, and provides distinctly for class of exceptions, or grounds of objection, mentioned in what are called the exceptions here.

The result is that we must overrule the motion to strike out these exceptions, and we hold that the motion to set aside the award has been filed in time. This leads us to a very inconvenient examination of facts, and one which we would have been extremely glad to have been saved, but, with our opinion, as to the law applicable to this stipulation, we must necessarily face that labor.

## SARAH MORROW vs. HENRY D. JAMES ET AL.

EQUITY. No. 7758.

{ Decided April 27, 1885.

{ The CHIEF JUSTICE and Justices WYLLIE and JAMES sitting.

Where the constitution of a building association required the stockholders to pay their dues upon their stock at regular stated meetings, payments not made at such meetings are not valid payments to bind the association in case of the embezzlement of such moneys by the officer so receiving them.

THE CASE is stated in the opinion.

WM. HENRY BROWNE for plaintiff.

R. K. ELLIOT for defendant.

Mr. Justice JAMES delivered the opinion of the court.

In the case of Sarah Morrow against Henry D. James and others. A bill was filed demanding the settlement of the account of a building association, and for the payment to the complainant of the moneys paid in by her with interest thereon at the rate of ten per cent. She sets forth the description of this association, naming a large number of stockholders, states the fact that, under one of the articles of the association, she had made payments of more than a dollar a month; that is to say, payments for the half year on two different occasions, becoming entitled thereby, under article 6 of the association, to eight per cent. on those payments. She then claims, under another article, the right of withdrawal or of restitution to her of her payments with ten per cent. per annum unless it shall appear, on the settlement of the accounts, that the association has sustained losses and has not made profits with the result of cutting down the amount to which she would be entitled.

The case was here before on the bill and answer, and at that time we rendered a decree construing the meaning of the provisions of their constitution or articles. The decree was as follows:

"This case coming on to be heard on appeal from the

decree rendered at the Special Term, &c., and the court being of opinion that the moneys misappropriated by Seth A. Terry, the secretary of the defendant, as shown in the proceedings, being the moneys paid into his hands by the individual shareholders, and not paid by him into the treasury of the association, was not a loss of the association within the meaning of the constitution and by-laws thereof."

The defence set up in the answer which the defendants have attempted to support by proof, was that a large amount of money, probably \$25,000, had been lost to the association by embezzlement committed by their secretary. It was claimed that these moneys were paid into the treasury; that the secretary was authorized, under the articles of association, to receive the moneys primarily and to turn them over to the treasurer, and that, when they reached the hands of the secretary, they were; therefore, the assets of the association and were in the treasury, though not yet in the hands of the treasurer.

The language of the article referred to, namely section 6 of article 4, is that "the treasurer shall receive all moneys paid into this association, and give his receipt for the same to the secretary." It is claimed that this language imports that, inasmuch as the treasurer is to give his receipt to the secretary, the moneys are first to be received by the secretary and then paid over to the treasurer. If they are, by virtue of the constitution, received by the secretary as its receiving officer, they are already assets of the association, provided they are received according to the constitution in other respects.

We are of opinion that moneys were properly paid to the secretary as the receiving officer of the association, provided (it must be added) they were paid according to the other provisions of the constitution. The provision to which I refer in stating that proviso, is found in article 6, and is as follows:

"Each stockholder or trustee for each and every share of stock held by him in this association, shall pay into the treasury in lawful money at each and every stated meeting

of this association on the second Friday of each month, the sum of one dollar, until his share of the series of stock on which such monthly payment shall be made, shall reach a value of \$200, when he shall be paid \$200 for each share of the particular series owned by him so maturing, and the stock shall thereupon be cancelled."

After we had made that decree, by another clause of which we sent back the case for an accounting to be taken before the auditor upon testimony to be taken by him, the auditor took the testimony and made a report in which he held that certain moneys said to have been paid to the secretary under certain peculiar circumstances, were not assets of the association. The case comes now before us again upon the bill and answer and proofs.

We find that a large amount of money, amounting probably to \$25,000, was paid to the secretary, at a room ordinarily occupied by the association at its monthly meetings, but not at a meeting. These moneys he never reported to the treasurer. He gave his receipts according to the regular form used when he received moneys at the meetings. That form was approved and was provided by the association itself. It was a correct form, and we are of opinion that the moneys should be first paid to the secretary and that he should first receipt for them, then that he should turn them over to the treasurer, and that this was a proceeding carefully provided for by the article which I have just read. The object of the arrangement was that both of these officers, the secretary and the treasurer, should be present at the same time that members of the association surrounded them making their payments, and that everything should be done under observation. That is upon the very face of the article, which says, "each stockholder shall make this payment into the treasury at each and every stated meeting." The arrangement furnished complete protection to the treasurer in keeping his accounts and so as to limit his responsibility, and to the parties making the payments.

These payments were made in disregard of that carefully devised protection. They were not made at the meetings

when the treasurer and the stockholders in greater or less numbers were present, but the parties paying the money supposed that the secretary would carry out the arrangement afterwards by turning the moneys over to the treasurer. To my mind it is just about equivalent to a payment made to a receiving teller of a bank at his house trusting that he would pay the money into the bank.

This protection furnished to the stockholder and to the treasurer was neglected by the parties making the payments, and it is for them to take the consequences. We are of opinion that the loss sustained by the appropriation of these moneys by this secretary was not therefore a loss of money out of the treasury, and cannot be taken into account in settling the affairs of the association, and that the result is that this complainant is entitled to the full amount, as the account shows, of the money paid by her with ten per cent. thereon. We therefore affirm the report.

The CHIEF JUSTICE dissented.

## JOB BARNARD vs. LIFE INSURANCE COMPANY.

EQUITY. No. 8,032.

{ Decided May 11, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. A party in making an assignment has a right to prefer creditors.
2. In the District of Columbia stock in an incorporated company cannot be subjected to the process of attachment or of execution.

THE CASE is stated in the opinion.

H. O. CLAUGHTON and H. E. DAVIS for plaintiff.

ELLIOTT & ROBINSON for defendant.

Mr. Justice MERRICK delivered the opinion of the court.

This is a cross-bill filed by the receiver of the German American National Bank, to subject certain stock which had been assigned to the plaintiff in the bill below to the lien of his judgment.

The plaintiff below was assignee of certain stock in the Life Insurance Company of the State of Virginia assigned to him for the purpose of compensating a lunatic for certain indebtedment to him by the assignor who was his committee, the indebtedment having been incurred many years ago and the assignor being at the time of the assignment unable to pay all his debts. The plaintiff, in the cross-bill, sought to arrest the perfection of that assignment which the plaintiff in the original bill was seeking to obtain through the instrumentality of a court of equity upon the ground that, as receiver of the German American National Bank, he was entitled to a lien upon the fund, which lien, as he supposed, had been wrought out by the levy of an attachment by way of execution upon his judgment prior to the assignment made to the plaintiff in the original bill.

It is well settled, independent of the provisions of the bankrupt and insolvent laws of the various States, and of the Federal Government when it had a bankrupt law, that a party has a right at common law and in common honesty to prefer one creditor over another. In this particular case there was every moral inducement on the part of the as-

signor to carry out in the acts that he did this legitimate right of preference, because he had wasted the assets of an imbecile which had been placed in his hands, and that of necessity therefore was one of the most sacred debts which could rest upon him morally and in honor too. And indeed, under the provisions of many of the insolvent and bankrupt laws, that sort of debt was regarded as so sacred that fiduciary obligations were exempted from the operation of such laws.

This being the equity of the case, therefore the plaintiff in the cross-bill could have nothing to rely upon unless it were the obtension of a legal lien through the levy of his attachment by way of execution. But here again the laws of the District of Columbia come short of the provisions which obtain now in nearly almost all the States of the Union in not making any provision by means of which stock, in an incorporated company, can be subjected to the process of attachment or the process of execution. It is well settled at common law that that sort of property is of such a shadowy nature that the hand of the law cannot grasp it so as to give to any creditor any right against it which can be enforced through any judicial process.

The lien therefore, under these circumstances, having failed altogether, the plaintiff in the cross-bill having no equity paramount, but, on the contrary, an equity subordinate to the equity of the plaintiff in the original bill, must fail in his application in the cross-bill, and it will be dismissed with costs.



JEREMIAH COSTELLO vs. CHARLES KNIGHT.

LAW. No. 23,255.

{ Decided May 11, 1885.

{ The CHIEF JUSTICE and Justices WYLIE and JAMES sitting.

1. A preliminary examination and discharge of the assured by an examining magistrate is such an ending of the proceedings as will support an action for malicious prosecution, although the accused was afterward indicted by the grand jury for the same alleged offence after the bringing of the civil action.
2. After his examination and discharge by the Police Court the accused brought a civil action against the prosecutor to recover damages for malicious prosecution. Pending that action the grand jury indicted the accused for the same alleged offence, and on trial he was acquitted. The civil action then coming on for trial, the plaintiff, against the objection of the defendant, offered in evidence the record of the indictment and acquittal which was admitted by the court. *Held*, Error, because there was no evidence that the defendant had promoted or originated the proceeding by indictment. Had that been shown it would have been admissible for the purpose of proving malice. The fact that his name was on the back of the indictment was not of itself any proof of malice.
3. On a trial for malicious prosecution the indictment is *res inter alios* so far as concerns the matter of fact which it goes to establish. It is evidence of the fact of a prosecution and of the fact of an acquittal, but as between the plaintiff and defendant it does not determine the guilt or innocence of the accused.
4. It is for the jury to determine the facts, but it is for the court to say whether those facts constitute want of probable cause.
5. It seems, per James, J., that the discharge by the examining magistrate is *prima facie* evidence of want of probable cause.

THE CASE is stated in the opinion.

FRANKLIN H. MACKEY for plaintiff.

T. A. LAMBERT for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This was a suit for malicious prosecution. We gather from the bill of exceptions on the record brought up, without any testimony, that the defendant, Knight, made complaint before the Police Court, charging the plaintiff, Costello, with the forgery of a certain instrument. On the hearing of that complaint, Costello was discharged and released from custody. Thereupon he brought an action

against Knight for malicious prosecution. Afterwards an indictment was found against Costello, which indictment it was admitted, was for the same alleged offence. On the trial of that indictment Costello was acquitted. A few days after that acquittal the civil action for malicious prosecution came on for trial, and, in the course of the trial, the record of the indictment, of a proceeding which had been commenced and ended between the bringing of the civil action and its trial, was offered in evidence, objected to and admitted. In reference to the effect of that indictment the court charged the jury, or I should say instructed them upon the effect, in these words:

"The jury are bound by law to hold that the plaintiff is not guilty of the forgery with which he was charged, if he was acquitted by the verdict of a jury."

A verdict and a judgment for five hundred dollars damages was recovered against Knight in this civil action, and he has taken his appeal here upon six bills of exceptions.

Changing the order of the propositions as presented in the bills of exceptions, we will notice the prayers of the defendant first. Substantially he asks the court to instruct the jury that this complaint on the preliminary examination, although it ended in the discharge of the prisoner, was not the ending of a proceeding in such a sense as to entitle the defendant in that prosecution to bring his action for malicious prosecution on the general principle that the prosecution must have ended before the action for damages arising from it can be maintained.

It was very strenuously urged that a prosecution before an examining magistrate contemplates in law that there may be a further proceeding, and in legal contemplation it should not be regarded as having come to an end with a discharge on the preliminary examination, because it is always competent to lay the case before the grand jury and to have an indictment, the importance of which was illustrated, as the defendant insisted, by the fact that an indictment was found.

There is abundant authority, however, to support the

right to bring an action for malicious prosecution where the case was one of prosecution by complaint before an examining magistrate which ended in the discharge of the prisoner. The reasons for that are apparent on principle. This action for malicious prosecution is brought upon the theory that there has been an abuse of the processes of the law. That is a process of the law which can be abused just as well as an indictment can. And, therefore, a preliminary examination and discharge constitutes on principle a sufficient cause for the action. We need refer only to one case, that of *Secor vs. Babcock*, 2 John., 204, where a party was arrested and brought before a magistrate on a charge made by the defendant in an action for malicious prosecution, and he was discharged, the action was maintained.

As to the assumption that it was only a part of a process that might go on, we have only to say that there is no connection between the two proceedings. If he had been held to answer before a grand jury the proceeding would have been one connected one, and it would not have been at an end. But here he was discharged and the proceedings before the grand jury were necessarily, in legal effect, entirely independent. There was good ground, therefore, to bring this action so far as the conclusion of the proceedings is concerned on which the action is brought.

The court, however, against the objection and exception of the defendant, admitted the record of the indictment found after this civil action had been brought. All that is shown is that an indictment, on the back of which the defendant Knight appears as one of seven witnesses, has been found against this same party for this same offense.

It must be shown that this defendant had some connection with that indictment, or it is wholly irrelevant, and that should appear in the bill of exceptions. It does not appear by his name being simply on the back of the indictment. He may have been summoned there *in invitum* and as one of seven witnesses, and we are not to assume that he was the prosecutor; he must be connected with this prosecution as the prosecutor.

In the English cases that fact would be known perfectly

well, because they have a prosecuting witness. We have none; nobody is the prosecuting witness here; he is simply a witness. His proceedings could be shown *aliunde*; they could be shown, it appears from the authorities, even by the testimony of a grand juror to show what he did. But it does not appear by the simple introduction of this record that this man, as one of the witnesses, presumably brought there at the instance of the Government, had anything to do with promoting this prosecution. It is not proper that it should be introduced against him for the purpose of proving malice, unless he appears to have been the originator of the proceeding itself. In the argument it was frankly admitted that the only evidence was the record with this indorsement on the back of it. If he was shown to be the promoter or originator it might be evidence of malice in bringing a groundless action, because both elements must appear, that there is a want of probable cause and that, as a matter of fact, it was a malicious proceeding.

In dealing with this evidence, consisting of the indictment, the court instructed the jury that they were bound by law to hold that the plaintiff was not guilty of the forgery. This indictment is *res inter alios* so far as concerns the matters of fact which it goes to establish. It is evidence of the fact of a prosecution and of the fact of an acquittal. But whether the party ought to have been acquitted, whether he was guilty or innocent, it does not determine as between these two parties; and even if it were *prima facie* evidence, this defendant had clearly a right to contest that fact. But the court cut him off from it, and held that they were bound to hold that he was absolutely innocent, not of the crimes charged against him in the indictment, but on the preliminary examination. It might be said it would have no particular effect. Clearly it was an error, and its tendency was, in our opinion, to aggravate the damages. The jury could make no other use of it than to hold that a man absolutely innocent had been causelessly prosecuted, and therefore to award higher damages.

There is one other ruling which we think was erroneous. The court instructed the jury that "the length of time that elapsed between the alleged discovery of the forgery by the defendant and the date of the arrest, may be considered by the jury in determining the question of malice and the want of probable cause."

The jury is authorized to determine what the facts are, but the court should determine what is probable cause, and this instruction submitted that question to the jury erroneously as we think. This court has so held on this very question in the case of *Coleman vs. Heurich*, 2d Mackey, 189.

I might add a single remark in regard to a matter that was outside of the record but was discussed. It was claimed that the discharge ordered by the police judge was not *prima facie* evidence of want of probable cause. There has been some conflict of authority on that point, but there is very good authority for saying that it is *prima facie* evidence, the principle being very well laid down by Hall, J., in the case of *Bostick vs. Rutherford*, 4 Hawkes (N. C.) Reports, p. 83:

"In the incipient stage of a prosecution before an examining magistrate much less grounds of suspicion will induce him to bind over the accused for further hearing than will warrant either the grand jury to find a true bill or the petit jury to convict, and when the accused is discharged because a sufficient ground of suspicion has not been established against him, I can see no reason why such discharge should not furnish *prima facie* ground for an action against the prosecutor."

I ought to remark here, however, that I do not commit the court to any decision on that subject; I speak only for myself. In a Massachusetts case there was another question raised about it, but I found it chiefly related to the effect of a conviction. The North Carolina doctrine related to the peculiar effect of the committing magistrate having found that there was not even ground to subject the party to an inquiry, and I am not sure that it is not fair ground

for saying, as between the parties, that it is evidence, not conclusive at all, but evidence that there was no ground to bring an action. That however is my own personal view. The case is remanded for a new trial.

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WILLIAM MCGILL *vs.* THE DISTRICT OF COLUMBIA.

LAW. No. 22,891.

{ Decided May 25, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

1. Since the decision of the Supreme Court of the United States in *Barnes vs. The District*, 91 U. S., 540, the liability of the District for an accident, happening by reason of any neglect of duty in the control, management, custody and care of the streets, is no longer an open question in this court. Nor have the modifications which have been made in respect of the administration of the city, and of the mode of collecting taxes, at all changed the principles of liability established by that case.
2. Counsel for defendant, in his address to the jury, admitted that, under the instructions of the court previously granted, the only question for the jury to consider was that of damages. He afterwards excepted to the charge of the court on the ground that it confined the jury to that question. *Held*, That it was not competent for him, in the face of his formal admission for the purposes of the cause, to take exception to the charge of the court for thus limiting the mind of the jury to that which he himself, as the representative of the defendant, admitted was the only subject matter for their consideration.
3. The law requires all areas in the city of Washington to be protected by iron or stone railing, with an allowance of four feet for an opening or entrance. The property in question had an area along its entire front, but it was protected by no railing of any sort. The plaintiff slipped and fell into the area, injuring himself seriously. On an action for damages it was *held*, no defence that the plaintiff fell into the area at a point where the opening or entrance would have been had a railing been erected.

STATEMENT OF THE CASE.

This was an action brought against the District of Columbia to recover damages for injuries received in consequence of a fall into an open area in front of premises No. 607 Seventh street, N. W., in the city of Washington.

The declaration was as follows:

"The plaintiff sues the defendant, a municipal corporation created by law, for that whereas the defendant as such mu-

nicipality was, on the 20th day of December, 1880, and for many years prior thereto, and has ever since been, and now is, charged by law, among other things, with the duty of keeping or causing the sidewalks of the city of Washington to be kept free from obstructions and from open vaults, basements, cellars and areas below the grade of said sidewalks, unless protected by sufficient railings or balustrade, so that all citizens of the said District, and all others having occasion thereto, might safely traverse and pass on upon said sidewalks on foot without the hazard of injury from falling into such unguarded openings in the sidewalks aforesaid; yet, notwithstanding the said duty and obligations on the part of the defendant, it wrongfully and negligently permitted an area of the length of 18 ft. 6 inches, and of the depth of 4 ft. 9 inches, and of the width from the building line of 6 ft. 10 inches, to be made in the sidewalk in front of the basement of the building known as No. 607, on the east side of Seventh street N. W., and immediately opposite the Department of the Interior, the said Seventh street N. W., being one of the most frequented thoroughfares, both for vehicles and pedestrians, in the said city of Washington, and the locality aforesaid being one of the most thronged parts of said street, and on the 20th day of December, 1880, and for a long time prior thereto, the said area was, and had been, by the carelessness and negligence of the defendant, permitted to be and remain without any railing or guard of any kind whatever, to the great hazard of persons passing thereby on foot; of which the defendant had notice; and on the day and year last aforesaid, the plaintiff, while passing along said sidewalk, in front of said area, and being partially blinded by the snow that was then falling, and without carelessness and negligence on his part, slipped upon the pavement and with great violence fell headforemost into said area, striking his head against the iron jam or cheek of the door to the basement of said building No. 607, and thereby causing a wound upon the top of his head four inches in length; in consequence of which injury erysipelas supervened, and he was dangerously sick

and was confined to his bed from the said 20th day of December, 1880, until the 6th day of March, 1881, and at times during his said illness his life was despaired of. During all of said time, and until the present time, he has suffered great bodily pain; and, as a further consequence of said injury, the nerves on the right side of his head are completely paralyzed, and the muscles and tissues on the right side and back of his head are destroyed. He has no sense of feeling on the right side and back of his head. By reason of said injuries his health and capacity to earn a livelihood are greatly and permanently injured, and he is constantly liable to renewed attacks of erysipelas and to neuralgia. He has already expended about \$800 for physicians, surgeons, medicines and attendance, and he will probably have a continuing necessity for similar expenditures so long as he lives.

“He claims \$20,000 damages.”

Issue being taken, the plaintiff, on the trial, offered evidence proving substantially the following facts:

That the plaintiff, a resident of the District of Columbia, while passing along on the east side of Seventh street N. W. in the city of Washington, District of Columbia, at about 12 o'clock m. on the 20th day of December, 1880, during a snow storm, and when there was considerable ice on the pavement, slipped and fell down an area way in front of premises No. 607 Seventh street N. W., striking his head against the northern iron jamb of the doorway leading into the barber shop in said premises; that said area extended the entire width of said premises; that at the time it was blowing a gale of wind from the north, driving the snow in the plaintiff's face; that he had no umbrella in his hand at the time, and that he was holding his head partially down to keep the snow out of his face; that there were six iron steps, extending the full width of the building, leading down into said area to the entrance of said barber shop; that the distance from the outer edge of the steps leading into said area to the building line was eight and a half feet, and the perpendicular depth of said area, four feet nine



inches; that the distance from the outer edge of the steps to the outer edge of the pavement was seven and a half feet; that the basement of said building was occupied by a barber shop; that the plaintiff slipped and commenced to fall about a foot north of the northern iron jamb of said doorway of said barber shop, and that if he testified in the former trial that he fell just opposite the door of the barber shop, it was an inadvertance; and at the time of said accident there was no protection whatever about said area way, and that there had been no protection at said place for eight or ten years before said accident occurred; that since said accident a railing had been put around said area way with posts about four feet apart; that there is also at present an opening in said iron railing, so put for the protection of persons passing along said street, for the purpose of egress and ingress to said barber shop; that the cause of the plaintiff's falling was that his feet slipped, and also because some person either jostled against him or the plaintiff jostled against some one, and fell headforemost down said area way; that said street was thronged with people at the time, it being within a short time of the holidays; that the plaintiff was assisted from said place of accident to a drug store on the southeast corner of Seventh and F streets northwest, and after being there treated was taken home. That the injury received by the plaintiff consisted of a wound in his skull about an inch in depth and width, and that in consequence of such injury erysipelas supervened, and he was confined to his bed for a considerable time; that he has since said injury suffered from nervous prostration and neuralgia, which he had never been afflicted with prior to said accident; that he was put to some seven or eight hundred dollars' expense on account of said injury for doctor's bills, nurse, etc.

Section 17 of the Building Regulations of the District of Columbia, as adopted by the Commissioners of the District, August 22, 1878, was then offered in evidence. The same being as follows:

"Sec. 17. Areas must be protected by iron or stone rail-

ing at least forty-two inches in height; and where they extend the entire width of any lot frontage shall be protected by said railing with openings or gates four feet wide."

And thereupon the plaintiff rested.

Whereupon the defendant offered testimony tending to show that the distance from the curb adjacent to the sidewalk in front of the building to the outside edge of the coping line around the area way was eleven feet six inches; and, further, that the plaintiff, at the former trial, testified that his feet slipped and that he fell right opposite the door of and at the entrance to the barber shop, striking his head against the northern jamb of the barber shop door, which is on the left as you go down into the area; that when he fell and struck his feet were inclined toward the street and up the steps.

And thereupon the defendant rested.

Whereupon the defendant moved the court to instruct the jury as follows:

1. If the jury find from the evidence that the plaintiff fell opposite the door of the barber shop, where an opening for entrance to said shop was allowed by law, they must find a verdict for defendant.

2. If the jury find from the evidence that the plaintiff fell opposite to the door of, and at the entrance to, the barber shop, they must find for the defendant, unless they further find from the evidence in the case that if the railing had been placed in front of the area, where required by law, that such railing would have prevented the accident.

3. If the jury believe from the evidence that the plaintiff fell opposite the entrance to the barber shop, at a point where the law permits an opening to exist in the railing for the protection of areas provided for by the building regulations, and that the accident would have happened if the area had been so protected, then the plaintiff is not entitled to recover.

4. If the jury believe from the evidence that the proximate cause of the injury to the plaintiff was his jostling, or being jostled by some other person, and slipping and falling, in

consequence, on the ice and snow, then the plaintiff is not entitled to recover.

5. If the jury believe from the evidence that the plaintiff, while passing up Seventh street, and in front of the area complained of, was jostled against by some one, or he jostled against some one, and fell down said area at a point where the law permits an opening, and further find that said accident would not have happened but for said jostling, then the plaintiff is not entitled to recover.

6. The present form of government of the District of Columbia, consisting, as it does, of officers who are all appointed and paid by the United States, without any power to levy taxes or spend money except as directed by Congress, is not of such a character as to make the District responsible in damages for any negligence of those officers.

7. The present government of the District of Columbia having been imposed upon the people of the District, without any power or opportunity on the part of said people to accept or reject the same, the District cannot be held responsible for the negligence of said Government.

8. If the care of the streets of the city of Washington, as a public duty, was imposed by statute upon the District of Columbia, the performance of which is for the general benefit, and the District derives no benefit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such public duty.

9. The District of Columbia, under the form of government existing at the time of the accident, which is the subject matter of this suit, is not liable for damages resulting from said accident.

All of these instructions were refused, the defendant excepting. The court then instructed the jury as follows:

"GENTLEMEN: As alluded to by Mr. Miller in his remarks, the only question left in this case, under the instruction of the court, is the question of damage.

"The general rule, when a man comes into court and claims damages in an action like this, is that the jury shall

compensate him for the injury he has sustained. You are to weigh all things together, one against the other, and to decide what reasonably should be given to a person who has been injured in the way you find this man was injured, if you so find. What should be the amount you should allow? It is not a case for punitive or exemplary damages. Now, the grounds upon which the jury should act in this case in determining what should be the measure of compensation are these:

"First. There is no proof here that this plaintiff lost any wages, or any deduction in his wages, on account of the accident. He was in a place at the time he was injured, and he is in a place still; he didn't say that he lost his place or lost his wages, and it was, I think, a proper thing for the District to go on and pay him. Hence, you cannot guess that he lost any wages, and, therefore, you are to take that out of the case. Speaking of expenditures, you are to consider the amount of expenses he was put to by reason of the injury. His statement on that question is that he paid for nursing about \$88; that he paid for drugs about \$100; (he said on cross-examination that it was at least \$92, but he didn't know what it was, it was somewhere in the neighborhood of \$100), and that his expenses altogether were about \$700 or \$800. Dr. Hazen said that he charged \$300 for his services, which had been paid in part. The plaintiff says that Dr. Prentiss charged him \$150, and Dr. Thompson charged from \$5 to \$10. The washing, he says, was 25; but I suppose he meant the extra washing. He didn't say who nursed him; but his son said that his mother and sister did so. Now, if you believe that they did the nursing, he could not say that the \$88 was what *they* charged him. He could not charge for their services in nursing; but the presumption, I presume, is that it was somebody else he paid for the services. The testimony the other way is that the wife and daughter did nurse him.

"Now, if you find that he was injured by the negligence of the defendant, in not having this railing there, then these are proper items of charge: the amounts that he is out of

his bodily and mental suffering. Now, he says that his sufferings were intense and agonizing, and from the doctor's statement of the case, and from the nature of the wound, his sufferings must have been very severe. That is not a matter that can be proved very well. You must decide that according to your good sense; and say what you think he is entitled to for it. Then there is again evidence of the effect upon his permanent health. The principal witness on that subject is Dr. Hazen, who said that certain tissues between the cuticle and the skull are absent, and that the absence of those would incline him to take cold and to neuralgia because of that much more readily than he otherwise would. He also says that this attack, and the condition in which it left him, would expose him to the recurrence of erysipelas, and that it would be more dangerous, in his case and with less chance of recovery, than in others, who had not met with such an accident. That is an element you can also take into the account that he has been permanently injured, and, if you think he has, you are to make him a fair and reasonable allowance. This is not a case for punitive damages—exemplary damages—but it is a case for fair and reasonable compensation for the injuries he has sustained by this accident. As a matter of law, I say to you that there is a cause of action, and that the defendant is liable, if you believe that it was a piece of negligence on their part in allowing that place to remain unprotected. As to the plaintiff's slipping, something was said about that. The law says that these areas shall be enclosed by iron railings. It does not mean, it is not based upon the idea, that they are necessary when people walk along carefully. It is for such cases that might occur accidentally in a great thoroughfare, where people may jostle each other. He fell right opposite this area. What ordinary experience shows is that if the railing had been there possibly he would not have fallen, because he would have had these railings to catch at. There was no railing there, and there were steps leading down into the area. If a man had begun to descend there by falling, and a rail had been there as required by law, he

pocket, or what he owes the doctors; what he has paid the druggist; what he has paid for washing that was rendered necessary, as he says, by the condition of the wound on his scalp. You are also at liberty to allow him in such case for would have had something to catch at, something to grab hold of. Gentlemen, take the case."

To so much of the foregoing charge, as is included in the following paragraphs, the defendant excepted:

1. "The only question left in this case, under the instruction of the court, is the question of damage."

2. "As a matter of law, I say to you, that there is a cause of action, and that the defendant is liable, if you believe that it was a piece of negligence on its part, in allowing that place to remain unprotected."

He fell right opposite this area. What ordinary experience shows is, that if the railings had been there, possibly he would not have fallen, because he would have had these railings to catch at. There was no railing there, and there were steps leading down into the area. If a man had begun to descend there by falling, and a rail had been there, as required by law, he would have had something to catch at, something to grab hold of.

A motion for a new trial being overruled, the defendant appealed to the General Term.

S. S. HENKLE and C. MAURICE SMITH for plaintiff.

A. G. RIDDLE and FRANCIS MILLER for defendant.

Mr. Justice MERRICK delivered the opinion of the court.

In this case—McGill against the District of Columbia—there were substantially three points presented by the appellant. The first was, that under the existing laws touching the organization of the District of Columbia, there is no longer any liability on the part of the authorities for an accident happening by reason of any neglect of duty in the control, management, custody and care of the streets of the city. The court, after the decision in the case of *Barnes vs. The District*, 91 U. S., 540, does not think that that is

any longer an open question in this court, nor does it think that the modifications which have been made touching the administration of the city and touching the mode of collecting taxes, at all change the principle of liability established by that case.\*

The second question in order, is the exception taken by the counsel to the charge of the court, in which it is supposed that the court took away peremptorily from the jury every question except the question of damages in the cause. A careful consideration of the charge will show that that is is not a proper construction of it, and even if it were it would be justified by the state of the record, inasmuch as it appears by the charge of the court incorporated in the bill of exceptions that the counsel for the defendant himself admitted before the jury that the question of damages was the only question before the jury, subject of course to the review of this court upon the law as laid down by the court below in the specific instructions previously given. But the law as there laid down was the law for that court at that time and for that jury. The counsel then, in that case, having admitted in open court, in the presence of the jury, as certified by the bill of exceptions containing the charge, that that was the only question before the jury, it does not seem to us competent for him in the face of that formal admission for the purposes of the cause, to take exception to the charge of the court for thus limiting the mind of the jury to that which he himself, as the representative of the defendant, admitted was the only subject-matter for their consideration.

Therefore the ruling of the court is consistent, in that view, upon the charge and upon that exception.

The main point in the case arises upon the prayers made by the defendant, to the effect that the place where the accident happened being an area in front of a house, and the immediate point of the accident being in front of the door of the basement to which that area led, that that part of the area was a privileged point in the area, and that unless the

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\*See *Clark vs. The District*, 8 Mackey, 79.

plaintiff showed to the jury that the fall occurred at some other point of the area than that in front of the door, the defendant was not liable. This court does not so understand the law of the case. The only building regulation which has been referred to is contained in the record and is in these words:

“Areas must be protected by iron or stone railing at least forty-two inches in height; and where they extend the entire width of any lot frontage, shall be protected by said railing, with openings or gates four feet wide.”

There is nothing in that, and that is the only ordinance or building regulation on the subject, which grants, as a matter of right, that the party shall have in the area an opening directly at right angles to the walk and in front of the door. And it is well known, as a matter of fact, that in a large portion of the cases where areas are used in this city, the opening is not made immediately opposite to the door, but on the side, or in some other relative position towards the door.

Where an area is made, as this was, along the entire frontage of the lot, with a requirement that in such case it shall be protected by a railing, with openings or gates four feet wide, in the absence of a conformity to that regulation the whole area is an illegal area from beginning to end, and there is no right whatsoever for a party who has thus made an area which is illegal throughout its whole extent, to say that he had the privilege of exemption from liability for his violation of law because an accident may have happened in front of the door. There is no dedication, where an area is made to that extent, of any particular part of it for the uses of the building to which it is suppose to be subordinate. But, on the contrary, so far as the facts of this case disclose, here was an area eighteen feet in length, the entire frontage of the building, with steps of equal length, thus inviting, and so far as the party himself could do, dedicating the entire extent of that area as an adit to that building, in violation of the law, and thus taking away from him any pretence that



he had specially dedicated, according to a supposed privilege, a particular part of the area as an adit to that building. He is himself practically estopped from saying that he had dedicated that particular portion in front, since he had made the whole stairway down that area equally the means of approach to the doorway of that house.

It is all important, whatever may be the hardship in the particular case, that the areas of this crowded city, becoming more and more crowded, which have been dedicated to the uses of the public, should not be subordinated to the particular objects of gain, pleasure or otherwise of the occupant of a particular house. The rights of the individual are held in subjection to the rights of the public, and it is the duty of the court, however painful it may be in a particular instance, to hold up the rules of law with a stern and unflinching hand in order that the rights of the public may not be violated under any gradual encroachments created by the greed of those who happen to own property along the line of the highway. Individual interest is secondary always to the public right and the public good.

For these reasons, the court holds that this area being illegal throughout, an accident in any part of it is an accident for which the public authority is responsible; and the judgment of the court below, being without error, must be affirmed.

THOMAS J. FISHER ET AL. vs. ALMERIN H. LIGHTHALL.

LAW. Nos. 25,128, 25,188, 25,268, CONSOLIDATED.

{ Decided May 25, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

In the letting of a house (whether furnished or unfurnished) there is no implied contract or condition that it shall be habitable.

STATEMENT OF THE CASE.

These were three suits brought to recover monthly instalments of rent of a house and furniture under a written lease. The defendant paid rent for the time he occupied the premises from November 10, 1883, until he vacated them, February 18, 1884.

At the trial, and as a complete defence, the defendant's counsel offered to show by two expert plumbers, masters of their trade, that they had examined the premises; that they found the plumbing and heating apparatus defective throughout the house; that there were no traps at any place to prevent the escape of sewer gas through any of the pipes; that there was no ventilating pipe, save one which was wholly inadequate for the purpose; that the said pipe did not convey away the filth, &c.; that on two occasions during defendant's three months' occupancy of the premises he was compelled to have the said pipes blown or forced open for the passage of the filth (and the amount paid for these services); that there were no traps at the wash tubs, bath tubs or water closet, and there were no means to prevent sewer gas from filling the house, and that such gas is highly injurious and detrimental to health.

Defendant further offered to prove by three competent witnesses that shortly before or about the 10th of November, 1883, the date of the renting, the house was well ventilated, had no fire, and appeared suitable for habitation; that the defects afterwards found were then latent; that shortly after, and as soon as the furnace and range in the house had been put in order, fires kindled, and the house heated, the premises became intolerable and unfit for human

habitation, from the sewer gas penetrating the house from the sewers, and from the illuminating gas escaping from the gas-pipes, and that one or more members of defendant's family were made ill, and continued ill during the whole time of defendant's occupation of the premises, from the noxious gases and unhealthy condition of the house, made so by the defective plumbing; that the physician and medical adviser of defendant, after vainly endeavoring to restore them to health, declaring the condition of the house to be the cause of their sickness, required and directed the removal of defendant's family from the premises, and refused to continue his attendance at this place, as it would be waste of time.

And also that the said premises were infested with ants from the basement to the garret, so that no articles of food could be protected from their depredations, and that these ants infested also the furniture in the house, by means of all which the house was unfit for human habitation.

But the court overruled said offer and excluded all said proof; to which exceptions were taken.

The court directed the jury to find a verdict for the plaintiffs. The defendant then appealed to the General Term.

GEORGE E. HAMILTON for plaintiff:

There is no stipulation in the lease, and no implied condition that the property was fit for anything. The lease is the only contract between the parties.

FRED. W. JONES for defendant:

There is an implied condition in the renting of a furnished house that it is in a fit state of habitation. *Smith vs. Marrable*, 11 M. & W., 5.

In *Campbell vs. Wenlock* (the nuisance here was bugs), 4 Fos. & Fin., 716, Cockburn, C. J., directed the jury that if the "nuisance prevailed to such an extent as to destroy the reasonable rest and comfort of the inmates the tenant could refuse to occupy or to pay rent."

In *Wilson vs. Finch Hatton* (the nuisance here was bad

drainage), Kelly, Chief Baron, said, where there is either great discomfort, or danger to health, the tenant is entitled to repudiate the contract altogether, and Huddleston, Baron, in the same case, said, "the implied condition is that the furnished house shall be reasonably and decently fit for occupation." 2 Law R., Exch. Div., 336.

In *Bird vs. Greville*, Justice Field came to the conclusion, on the facts, "that the house was in such a state that a person could not live in it without risk," and gave judgment for the tenant. In this case there had been infectious disease in the house and it had not been disinfected.

Mr. Justice JAMES delivered the opinion of the court.

In the consolidated cases of Thomas J. Fisher and others against Almerin H. Lighthall, it appears from the record that Fisher & Co., acting as real estate agents are accustomed to do here, executed in their own name a lease to the defendant Lighthall of a furnished house in this city at the rate of one hundred dollars a month for one year from the 10th of November, 1883.

It also appears that the tenant occupied the premises several months, and then, claiming that they were in an uninhabitable condition, left them, and afterwards surrendered the keys to the landlord, that is handed them to him, although they were not accepted by way of surrender. The defendant paid the rent up to the time he left.

Suit was brought for the recovery of the rent for the remainder of the term. The defendant's counsel offered to prove the house uninhabitable at the time of the demise by the following evidence:

"To prove, by three competent witnesses that shortly before or about the 10th of November, 1883, the date of the renting, the house was well ventilated, had no fire, and appeared suitable for habitation; that the defects afterwards found were then latent; that shortly after, and as soon as the furnace and range in the house had been put in order, fires kindled, and the house heated, the premises became in-

tolerable and unfit for human habitation from the sewer gas penetrating the house from the sewers, and from the illuminating gas escaping from the gas pipes, and that one or more members of the defendant's family were made ill, and continued ill during the whole time of defendant's occupation of the premises, from the noxious gases and unhealthy condition of the house, made so by defective plumbing."

He also offered to prove that the premises were infested with ants from the basement to the garret, so that no articles of food could be protected from their depredations, and that these ants infested also the furniture in the house, by means of all which the house was unfit for human habitation.

The lease contains covenants on the part of the lessee that he will take the house and hold it for one year from the 10th of November, 1883, and that he will pay this rent and the gas bills and water rent bills, and that he will leave the premises in like good order in which he took them. It contains no express condition or reservation in case the house proved to be unfit for habitation at the time he took it. He claims, however, that the law establishes a condition—not merely a covenant, but a condition—that if a house is let furnished (for he confines himself to that), and it is not in a habitable state, the lessee may throw up the lease and abandon the premises without liability to pay rent for the property.

We were referred to the case of *Smith vs. Marrable*, 11 Mees. & W., 5, decided by Lord Abinger, chief baron of the circuit, and afterwards adopted by the judges of the exchequer, where a house simply designated as house No. 5 Brunswick Place, London, was rented for a short period, being as a matter of fact a furnished house. Lord Abinger held, that the party could abandon the premises on finding that the beds were incurably infested with bedbugs—that is shown to have been the meaning of the language used by a subsequent case in which Lord Abinger commented upon this one. He dwelt upon the dual character of the letting;

that it was not a letting of real estate simply nor substantially, but was a letting of a furnished house in which the furniture was one of the constituents demised. There was no specific description of the furniture to be let, and his lordship was of opinion that there was an undertaking that a furnished house should have appropriate furniture in it. That was all of the case. The objection of the lessee did not relate to any defect of the real property, but was wholly to the furniture, and the court thought that in such case there was an undertaking that suitable furniture should be substituted and if it were not the party could give up the lease.

The principles on which they undertake to establish this seem to be very shadowy, and they begin upon a very curious basis. Baron Park referred to two cases of this character, as showing that where premises held from year to year become untenable, the courts sustain the tenant in his abandonment of the premises without notice to the landlord. That has no application to a case of a fixed tenancy for a specific term, for the law created that tenancy from year to year and upon equitable considerations.

Resting upon such grounds as that the exchequer sustained Lord Abinger in his conclusions that where house and furniture were let, and there appeared to be no specific designation of the particular furniture, there was an implied undertaking that appropriate furniture should be put into the house if such furniture was not there already, and if that condition was not complied with, then the whole letting should be thrown out.

That question came up afterwards, in the case of *Sutton vs. Temple*, 12 Mees. & W., 52, and in the case of *Horl vs. Windsor*, in the same volume, page 68, and there it is perfectly apparent that the court cut the case down to the letting of a furnished house where there appeared to have been no specific description of the furniture to be let, and where the defect had been in the furniture.

At a later period the question came up in relation to a defect in the premises of the real estate itself. The case is

that of *Wilson vs. Finch-Hatton*, 2d Law R., Ex. Div., 336. A lady, through an agent, had taken a furnished house in London to be held by her during what is known there as the season—three months. It proved, when she arrived, that the house had a bad smell. She refused to occupy it and went to other lodgings, and wrote to the landlord that the house was unfit for habitation. The landlord then undertook to put it into good condition, when it was discovered that there was a cess-pool under the pantry, and that under the kitchen floor there was a most frightful condition of filth that was covered up. Chief Baron Kelly was of opinion there, that where a house was let furnished for immediate occupation, under just such circumstances as I have described, there was an understanding that it should be habitable. After discussing certain principles, he said:

“I now proceed to consider whether both parties to this agreement intended that the house should be fit for occupation; that is, that it should be reasonably healthy, and so not dangerous to the life of those inhabiting it. I think that it is quite manifest that they did so intend; and, indeed, one of the letters of the lady who intended to occupy the house (and she is practically the defendant), mentions the subject of drainage. Is it not, then, clear that the tenant is entitled to find the drains in such a condition that she and her family and her servants can safely enter and live in the house? However, on the contrary, when she entered, she found that there were strong and noisome odors in the house, and that there was under the rooms in the basement a deposit of filth and fœcal substance, which it was absolutely necessary to remove before the house could be safely occupied by anyone. Without doubt, a person who so enters under such an agreement as this on furnished premises in the condition just described, may at once throw up the lease and decline to pay any rent under it. Can it be that the lessee would be bound to give notice of the defects in the house to the lessor, and then to procure another temporary residence, and wait there until the lessor had completed the alterations necessary to render the house healthy?

I am of opinion that if such were the law of England it is time that it should be altered. But the law is not so," he added.

That, then, is the only case cited to us in which a defect to the real property was held to be a ground on which the party could abandon the lease without paying the rent; in other words, the only case in which such a defect was held to be a condition to the letting.

In the other cases the court expressly disclaimed any intention to apply this rule to the letting of real property as a rule appropriate in such cases, and they applied it only on the ground that there was coupled with it a condition implied from this contract about the furniture.

The same question has come up in this country. The later English cases have declined to apply that doctrine, and the American cases have followed these later cases.

There is a very marked case in 9th Cushing, where the court quote from the Exchequer Court decision, and they express the opinion that under such a condition of letting, the health of the premises, might not seem to be an unreasonable rule in such cases, yet it was not in the power of the court to establish such a rule; that parties are to be left to make their own contracts, and where they have done so the courts will not undertake to introduce new terms into a written contract. We constantly insist upon that with regard to all other contracts where they are supposed to set out the full intention of the parties, and certainly it is quite as reasonable to do it in respect to the letting of land where the contract is generally made with peculiar deliberation.

I have to remark that although it might seem to be a reasonable condition, and if we had to establish the law for the first time, we might think it was a reasonable condition for the courts to enforce, that property for human occupation should be understood between the parties to be at least healthy, yet parties choose to make their own contracts and we must leave them to that. It is safer, on the whole, and the ordinary principles applicable to other cases of



written contracts are just as applicable and as reasonably applicable here.

Furthermore, it may be said that great inconvenience on the other hand might arise from an attempt of the courts to introduce this principle. About as much fraud would arise in the attempts of tenants to break up the lease when they found the premises were disagreeable as when the premises were not disagreeable. It is better, therefore, that parties must make their own contracts and protect themselves. The law does not undertake to treat contracting parties as requiring nurses. We must apply here the ordinary rule which has always been understood to regulate the contracts of parties to the letting of houses, viz., that there is no implied contract or condition, that the premises shall be habitable.

The judgment of the court below is affirmed.

## THE SECOND NATIONAL BANK OF WASHINGTON

vs.

FRANK HUME AND JAMES K. CLEARY, Surviving Partners of  
HUME, CLEARY & Co.

LAW. No. 23,258.

{ Decided May 25, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

1. While it is perfectly competent for the holder of commercial paper to rest, in the first instance, upon the proof of the signature of the party to be charged, as in the case of the last endorser, yet when the defendant in such a case offers to prove that there was fraud or illegality in the transaction, such proof is admissible, and when admitted it changes the burden of proof and throws upon the plaintiff the further obligation of accounting for the manner in which he obtained the paper and of showing that it was *bona fide* and for value received.
2. In a suit against a partnership firm as endorsers upon a promissory note signed individually by one member of the firm and endorsed by him, first with the name of one of the members of the firm and then with the firm name (which endorsements the defendants alleged to be fraudulent), it is competent for the defence to show that the note had never been the note of the first endorser or of the firm; that no value had been received for it by either of the parties subsequent to the drawer; that the note had been discounted by the drawer at the bank (the plaintiff) for his own benefit, and was treated throughout by the bank and the drawer as his own property. And such proof should go to the jury with appropriate instructions from the court in order that they may determine from all the facts and circumstances of the case whether the accommodation was made for the benefit of the firm or for the benefit of the drawer. And if the jury should find (as is their exclusive province) that the accommodation was for the drawer in his individual capacity, and that the name of the firm was put there as an accommodation endorser, then before the bank could recover it would be necessary for it to establish the fact that the drawer had authority so to use the name of the firm.
3. It is not enough, however, that the defendants show that the plaintiff had reason to believe that there existed these infirmities in the note. They must show knowledge on the part of the plaintiff; but this knowledge the jury may infer from the testimony.

## STATEMENT OF THE CASE.

This was an action against the defendants as indorsers of the following paper:

"\$1,200.

WASHINGTON, D. C., Sept. 27, 1881.

"Thirty days after date I promise to pay to the order of

Frank Hume twelve hundred dollars, value received, with 8 per cent. interest until paid. Payable at 2d National Bank.

THOMAS L. HUME."

Endorsed :

"FRANK HUME

"HUME, CLEARY & Co."

Defence: That the endorsements did not bind the defendants, because made by Thomas L. Hume to raise money for his individual benefit without the knowledge or consent of his partners, of which the plaintiff had notice.

Issue being joined the plaintiff gave evidence tending to prove that on and before the date of the note in suit Thomas L. Hume, Frank Hume, and James K. Cleary were partners in trade under the name of Hume, Cleary & Co., and carried on the business of wholesale and retail grocers and liquor dealers in the city of Washington, D. C.; that the endorsement of the firm name on the note in suit was in the handwriting of Thomas L. Hume, who died a few days before the maturity of the note; that the note was presented by the notary of the plaintiff to its book-keeper at the counter of said bank and payment demanded at 4 o'clock in the afternoon on the 29th of October, 1881, the date of its maturity, and, not being paid, was protested, and the 30th of October, 1881, being Sunday, notice of demand, non-payment and protest was on the 31st of October, 1881, delivered to Frank Hume, and also, on behalf of the firm of Hume, Cleary & Co., to James K. Cleary. The attorney for the plaintiff then offered to read to the jury the note and certificate of protest, and to such reading the defendants' attorney objected, because no evidence had been given of the handwriting of the maker and first endorser of the note; but the objection was overruled and the note and certificate of protest allowed to be read; to which ruling the defendants excepted.

The plaintiff then rested.

Thereupon the defendants offered to prove that the endorsement of the name of Hume, Cleary & Co. was without

the knowledge, authority or assent of the defendants, or either of them, and in violation of the articles of copartnership of the firm of Hume, Cleary & Co.; and further, that the first information received by them, or either of them, of said endorsement was the notice of protest of the said note, and neither of said defendants ever confirmed or ratified said endorsement; and, further, that the name of Frank Hume upon the said note was not in the handwriting, nor within his knowledge, authority, or assent, and that the same was a forgery, and that the first information he had of the endorsement was through the notice of protest of the said note; and further, that no proceeds whatever of the said note ever went to the said defendants, or either of them, nor did any benefit ever accrue to them, or either of them, or to the said firm, from the said note; and further, that the transaction evidenced by said note never had any existence, but was wholly fictitious, and that the said note was made by the said Thomas L. Hume, and the name of Frank Hume was forged thereon, and the endorsement of Hume, Cleary & Co. was made by said Thomas L. Hume in fraud of his co-partners, and for the purpose of obtaining money for private advantage.

And the defendants, by their counsel, claimed that the aforesaid evidence was admissible, because the same affected the said note and endorsements with fraud and forgery, and threw upon the plaintiff the burden of showing that it paid value for said note, and, in taking the same, acted in good faith. And the said offered evidence being objected to by counsel for the plaintiff, the court refused to allow the same, or any part thereof, to be given to the jury. And the court decided that the several matters so offered in evidence were, and each of them was, inadmissible in evidence, unless the defendants further proposed to prove that the said matters were known to the plaintiff at the time it discounted the note sued on, or that the plaintiff had notice of the same, or that the plaintiff received the said note in bad faith.

And to the said ruling that the said evidence, or any part thereof, was inadmissible to shift the burthen of proof as to

value or good faith, and unless the defendants should further prove affirmatively knowledge or notice or bad faith on the part of the plaintiff, the defendants excepted severally to the refusal of the court to allow each proposition of fact contained in their offer.

The defendants then gave evidence tending to prove that Thomas L. Hume had a private account with the plaintiff; that the original note (of which the note in suit was the last renewal) submitted by Thomas L. Hume to the plaintiff for discount was dated August 11, 1881, for \$3,000 at five days, which by a series of curtails and renewals reached the note in suit; that the proceeds of said discount was placed to the private account of Thomas L. Hume with the plaintiff; that no portion of the proceeds of said discount went to said firm of Hume, Cleary & Co., or to either of the defendants, nor were the defendants consulted or notified of said transaction; that the renewal notices were always sent to Thomas L. Hume; that Thomas L. Hume never spoke to the defendants or either of them in relation to the transaction; that the first knowledge the defendants had of said renewals was at the trial of this cause and their first knowledge of the note in suit was after the death of Thomas L. Hume, when they received notice of protest; that M. G. Emery, president of the plaintiff corporation, frequently came to defendants' place of business, but always asked for Thomas L. Hume, and always talked privately with him; that defendants never spoke to Mr. Emery about this transaction, and never knew until the day of trial that one of the renewal notes was sent to the bank from the store of Hume, Cleary & Co.; that the defendants never knew that Thomas L. Hume was using the original note or any renewals of it for his private benefit, and never ratified his use of it; that the firm of Hume, Cleary & Co. was in good standing August 11, 1880, and never had occasion to borrow money, and that Thomas L. Hume for seven or eight years before his death was engaged in the dairy business and stock raising.

And, thereupon, the defendants offered to prove by Frank Hume, one of the defendants, that the plaintiff, when it dis-

counted the series of notes mentioned in the evidence, had reason to know and believe that the endorsement of the firm name by Thomas L. Hume was used by him as a mere accommodation endorsement to enable him to get money by the discount of the notes, said money to be used for his private purposes and not for the purposes of the firm, and that the plaintiff, having reason to know and believe that said Thomas L. Hume was acting as aforesaid, failed to make inquiry as to whether said endorsement was made by the authority or with the assent of the defendants, and that such endorsement was not made by and with the authority or assent, and that the plaintiff, by discounting the said notes with such endorsement, and having reason to know and believe as aforesaid, enabled the said Thomas L. Hume to perpetrate a fraud upon his copartners, and had acted in bad faith.

And the court thereupon inquired of the defendants' counsel whether he had reason to know or believe, or expected to prove anything other than such grounds for knowing or believing, the matters he spoke of, as were testified to by Mr. Cleary; to which the defendants' counsel replied: "No, sir; I think not;" and also inquired whether he expected to prove by this witness that the plaintiff had knowledge of the said fact supposed to constitute fraudulent dealing on the part of the said Thomas L. Hume, in procuring the discount of the said note, at the time it was discounted by the plaintiff, to which inquiry the counsel for the defendants replied in the negative.

Whereupon the court ruled that the said testimony so proposed to be offered was inadmissible, and refused to admit the same to be given by the defendants. To which ruling the defendants excepted.

The defendants then offered a number of prayers, as follows, all of which were rejected:

"1. If from the whole evidence the jury shall find that the notes in the series given in evidence, beginning with that of the 11th of August, 1880, and ending with the note in suit, were presented for discount by Thomas L. Hume, the maker,

for his individual account, and were so discounted by the plaintiff, then the transaction on its face imported that the endorsement of Hume, Cleary & Co. was an accommodation endorsement, and it was not competent for the said Thomas L. Hume to bind his co-partners by such endorsement of the firm name without their authority or assent; and if without such authority or assent the said Thomas L. Hume made the endorsement of the firm name on the note in suit, the defendants were not bound thereby and the plaintiff is not entitled to recover."

"2. If from the whole evidence the jury shall find that the plaintiff, in discounting the notes offered for discount by Thomas L. Hume, and among them the note in suit, dealt with and treated the same as his individual property, then he, being the maker of the said notes, the endorsement of the firm name thereon was an accommodation endorsement, and it was not competent for him to bind thereby his co-partners without their authority or assent; and if the jury shall find that the endorsement of the firm name on the note in suit was made without such authority or assent, the defendants were not bound thereby and the plaintiff is not entitled to recover."

"3. If from the whole evidence the jury shall find that in discounting the notes given in evidence, including the note in suit, the plaintiff dealt with and treated the same as the property of the firm of Hume, Cleary & Co., then the plaintiff was not bound to know that Thomas L. Hume could only use said paper in the usual course of business, and could not apply it to his private purposes without the authority or assent of his co-partners; and if the jury shall find that the said note was discounted by the plaintiff at the instance of the said Thomas L. Hume, and the proceeds applied to his private purposes by the plaintiff and by his direction, then the plaintiff is not entitled to recover."

"4. The burthen of proof is upon the plaintiff to show that in discounting the note of the 11th of August, 1880, for the private benefit of Thomas L. Hume, and in renewing the same for such private benefit from time to time with the

endorsement of Hume, Cleary & Co., it acted in good faith and with reasonable and proper precaution."

"5. If from the whole evidence the jury shall find that the plaintiff knew, or had reason to know, that the said Thomas L. Hume was using the endorsement of the firm name in the transactions in evidence not for the purposes of the firm, but for his private purposes, then it was the duty of the plaintiff to know that the said Thomas L. Hume could not so use the firm name without the authority or assent of his co-partners; and if the jury shall further find that the firm name was so used, and for the private purposes of the said Thomas L. Hume, in the transactions with the plaintiff, without such authority or assent, then the plaintiff is not entitled to recover."

"6. It is for the jury to find, under all the circumstances, whether the plaintiff knew, or had reason to know or believe, that the said Thomas L. Hume was using, in his transactions with the plaintiff, the endorsement of Hume, Cleary & Co. as an accommodation endorsement, or was using the said endorsement, not in the usual course of the business, but for private purposes; and if the jury shall find that the plaintiff knew, or had reason to know or believe, that the said Thomas L. Hume was so using such endorsement, then it was the duty of the plaintiff to inquire whether such use was by the authority or assent of the defendants before making discounts upon such endorsement, and if the plaintiff, instead of making such inquiry, made the discount of the notes mentioned in evidence, and the endorsement of the name of Hume, Cleary & Co. was used without the authority or assent of the defendants, and was used as aforesaid, then the plaintiff is not entitled to recover."

"7. It is for the jury to find, under all the circumstances of the case, whether, in obtaining the discount of the 11th of August, 1880, and the subsequent renewals, the said Thomas L. Hume was acting in fraud of his copartners, and whether, if he was so acting, the plaintiff knew, or had reason to know or believe, the same. And if the jury from the whole evidence shall find that the said Thomas L. Hume



was so acting, and that the plaintiff knew, or had reason to know or believe, the same, then the plaintiff is not entitled to recover.

8. If the jury find from the evidence that the endorsement of the firm name, Hume, Cleary & Co., on the note in suit, and on those which preceded it, was made by Thomas L. Hume, a member of said firm and maker of said note, without the knowledge or consent of either of the members thereof, and they did not ratify or confirm it, and further find that the plaintiff discounted the note under an agreement with the maker that the proceeds thereof should go to his individual credit, and not to the use of the firm, then the defendants are not liable in this action.

9. If the jury find from the evidence that the promissory note in suit, and those which preceded it, was not passed by Thomas L. Hume, the maker thereof, to the plaintiff in the course of the ordinary business and transactions of the firm of Hume, Cleary & Co., and further find that neither of the defendants had any knowledge or information in relation thereto prior to the maturity of the note in suit, and that no part of the proceeds of any of said notes was applied to partnership purposes, then the plaintiff is not entitled to recover.

10. If the jury find from the evidence that the plaintiff knew at the time it received the original of the note in suit, and before it gave anything of value therefor, that the partnership name was endorsed thereon by the maker for his sole use and benefit, and the proceeds were so applied, and further find that the defendants, or either of them, had no knowledge of the existence of said note, nor of the renewals thereof, and never consented to nor ratified the endorsement of the firm name on said note, nor on any of the renewals thereof, including the note in suit, then the plaintiff is not entitled to recover.

11. If the jury find from the evidence that the original of the note in suit was made by Thomas L. Hume, without the knowledge or notice of the defendants, or either of them, endorsed the name of the firm, Hume, Cleary & Co., on said

note, and appropriated the proceeds thereof to his own use, without the knowledge or consent of the defendants, or either of them, then he acted in violation of his obligations and duties to the firm and in fraud of the firm; and if the jury further find from the evidence that the plaintiff had knowledge or notice, before it paid value for said note, that said Thomas L. Hume intended to appropriate the proceeds thereof to his own use, and not to the use of the firm, and further find that the defendants, or either of them, derived no benefit from said note or either renewal thereof, including the note in suit, and never consented to nor ratified such use of the name of the firm, then the plaintiff is not entitled to recover.

12. When a party takes negotiable paper, made, accepted or endorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or endorsed in the regular course of the business of the firm is apparent on the face of the instrument, or necessarily implied in the nature of the transaction, such party cannot though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of want of authority in the individual partner to bind the firm without their express assent.

13. When the fact, though existing, that such name was not signed or endorsed in the regular course of business of the firm is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury under all the circumstances. In every such case the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that, if they did, the other members of the firm assented to the transaction.

14. When the fact, though existing, that such name was not signed or endorsed in the regular course of the business

of the firm is not apparent from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their ability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice. In every such case the burden is shifted upon the defendant to establish notice.

And thereupon the court having severally refused to give each of the said prayers, and the defendants having excepted severally to such refusals, the court charged the jury as follows:

**GENTLEMEN OF THE JURY:** In your absence I have decidedly expressed my opinion as to the prayers which were offered by the defendants, and have rejected all of them. I have also considered it my duty to withdraw from your consideration a large mass of evidence, which was adduced by the defendants, tending, as they insisted, to prove some fraud in connection with this note. All of that class of evidence has been withdrawn from you. I therefore instruct you that if you shall find from the evidence that Thomas L. Hume was a partner of the firm of Hume, Cleary & Co., within the period from August 11, 1880, down to this date, that on the date of this note he signed it, and afterwards endorsed the name of Hume, Cleary & Co. upon the back of the note; that that note was discounted by the plaintiff, the Second National Bank; that after that note became due, notice and due demand was made upon the defendants in this action and protest was made upon its non-payment, according to the evidence given here by Mr. Balloch in the case, then, if you shall find those facts, the plaintiff is entitled to a verdict upon that note according to its face. There is no dispute that this gentleman was a member of that firm, for it was proved by the defendants as well; that this note was discounted by the bank; and also there is no dispute about the protest. If you find those matters which I have just stated to you, then your verdict should be for the plaintiff.

And to the withdrawal of the evidence from the jury, except in the particulars stated by the court, and to the instruction as given by the court, the defendants excepted severally.

W. F. MATTINGLY for plaintiff.

W. D. DAVIDGE, L. G. HINE and JOHN E. NORRIS for defendants.

Mr. Justice MERRICK delivered the opinion of the court.

In the case of Frank Hume and James K. Cleary, against whom a suit was brought by the Second National Bank of Washington, the plaintiff was the holder of a piece of supposed commercial paper in this form of words:

"\$1,200. WASHINGTON, D. C., *Sept.* 27, 1881.

"Thirty days after date I promise to pay to the order of Frank Hume twelve hundred dollars, value received, with eight per cent. interest until paid, payable at Second National Bank.

"THOMAS L. HUME.

Endorsed:

"FRANK HUME.

"HUME, CLEARY & Co."

At the trial of the cause the plaintiff offered in evidence the promissory note and the protest and proved the signature by Thomas L. Hume, the drawer, who was himself a member of the firm of Hume, Cleary & Co., of the firm name as the last endorser, and then rested.

In that state of the case the defendant offered to prove that the note had originated in fraud; that the name of Frank Hume, the first endorser, was forged; and that the name of the firm, Hume, Cleary & Co., had been placed there by the drawer without authority, and that the firm knew nothing whatsoever of the existence of the transaction and had derived no benefit whatsoever from it.

The court upon that offer of proof rejected the testimony as inadmissible in that stage of the case. In this we think there was manifest error. The rule of law has been laid

down by a concurrence of all the great authorities in this country to this effect: that, while it is perfectly competent for the holder of commercial paper to rest, in the first instance, upon the proof of the signature of the party to be charged, as in the case of the last endorser (which carries proof of the others and of the notice of protest—and that proof raises a *prima facie* case of good consideration and *bona fide* ownership), yet when the defendant in such a case offers to prove that there was fraud or illegality in the transaction, such proof is admissible, and, when admitted, it changes the burden of proof and throws upon the plaintiff the further obligation of accounting for the manner in which he obtained the paper, and of showing that it was *bona fide* and for value received.

This doctrine is very clearly laid down by the Supreme Court of the United States in the case of Commonwealth against Clark, 94 U. S., 285. But there is a later case, which was not referred to in the argument of the case at bar. It was decided in the State of Maryland, at October Term, 1881, and it so well expounds the rule of law and the reason of it—not that it is better authority, but being later and quoting and relying upon the decision in 94th U. S. which sets forth the rule of law clearly—that I may be pardoned (in giving the opinion of this court) for using the language of that eminent tribunal for the purpose of showing what the opinion of this court is in that respect. I read from the case of Cotton *vs.* Pusey in 57th Maryland, p. 452. The court says in its opinion:

“By the fifth prayer the court was asked to instruct the jury that if the note was transferred to the plaintiff before its maturity, then the onus was on the defendant to show by evidence that the plaintiff had notice of the want of consideration for the note, and the fraud in its procurement from the defendant, and that, in the absence of such evidence of notice to the plaintiff, he was to be presumed to be the holder of the note for value without notice. This clearly is not in accordance with the law. It is true that the endorsee or transferee in an action against the maker

of a negotiable note has nothing to do in the opening of his case but to prove the signatures to the instrument and introduce it in evidence, for the instrument goes to the jury with the legal presumption that the plaintiff became the holder of the same for value at its date or before maturity, in the usual course of business, without notice of anything to impeach his title. He is at liberty to rest upon this presumption, and is not bound, in the first instance, to show the circumstances under which he obtained the note or that he paid value for it, but for the defendant to show, by such proof as may be properly left to the jury to consider, that the instrument was procured by fraud, or was fraudulent in its inception, or that the consideration was illegal, or that it had been lost or stolen before it came to the possession of the holder. The burden of proof is changed and it is then incumbent upon the plaintiff to show that he acquired the note *bona fide* for value, in the usual course of business, before maturity and under circumstances that create no presumption that he knew of the existence of the facts that impeach the validity of the instrument. This is a well established rule applicable to negotiable instruments, and it is said to be wise and salutary in the protection it affords. It proceeds upon the presumption that the person who has been guilty of the fraud or illegality in obtaining the instrument would dispose of it and would place it in the hands of another person to sue upon; and it is because of such presumption that the proof of fraud, illegality or loss casts upon the holder the burden of showing that he is a *bona fide* holder for value or under what circumstances and for what value he became the holder of the note."

There the rule is laid down emphatically, and clearly assigns the reasons upon which the well founded rule is based in morals, and refers to 94th U. S., among others, and all the late authorities sustaining fully the position of the court in that case.

That being the rule of law it is manifest then that the court below erred in its first ruling in rejecting the offered proof on the part of the defendants to show that the note

originated in fraud and illegality and the forgery of the name of one of the parties.

In the further progress of the cause there was evidence offered on the part of the defendants, and admitted subject to exception, for the purpose of showing that the note had never been the note of the partnership or of the first endorser, and that no value had been received for it by either of the parties subsequent to the drawer, and further that the note was discounted by the drawer at the bank for his own benefit, and was treated throughout by the bank and the drawer (although the drawer was one of the parties composing the firm), as his own property.

It was proper upon that form of proof to submit the whole case to the jury to determine, as a matter of fact, whether the holder of the paper, at the time he discounted it on behalf of the drawer, was dealing with the drawer in his individual capacity or was dealing with him as a member of the firm for the benefit of the firm. Occupying the double character of drawer of the note and also one of the members of the firm endorsing the note, it would have been competent for him, notwithstanding the unusual form of the note, to have treated it as a note offered for discount by him in his character as a member of the firm for the benefit of the firm; and if he had professed to be dealing with the discounting bank in his character as a member of the firm for the benefit of the firm, the form of the paper, when it stands thus in the peculiar dual relation of a partner so dealing, would not have been as in the case in the 95th U. S.—the cashier of the Shawnee bank dealing with the paper of the bank—satisfactory proof that it was only accommodation paper on the part of the bank who was put there as an endorser, and that the party was therefore charged legally with knowledge and notice of the infirmity of it and bound to see whether the accommodation endorsement was for the benefit of the party offering it and duly authorized, but, on account of his dual character, he would still have had the right to deal with it as partnership paper if he had so dealt with it.

But the proof here goes on to show that he dealt with it as his individual paper; that the credit went to him; that he was charged as drawer, and his co-partner, Frank Hume, was charged as endorser, and the firm was charged as endorser; the whole course of dealing therefore indicating, or furnishing proof so to speak, that he was dealing with it as for his own benefit and using the firm as an accommodation endorser. All that proof was proof competent, therefore, to go to the jury notwithstanding he was a partner in the house, and notwithstanding he presented it and signed the name of the partnership. It was proof competent to go to the jury with appropriate instructions from the court, in order that they might determine, from all the facts and circumstances of the case, whether the discount was made for the benefit of the firm or for the benefit of the drawer. And if the jury should find (as a matter of fact it was for them exclusively to find) that the accommodation was for him in his individual capacity, and that the name of the firm was put there as an accommodation endorser, then, before the bank could recover, it would be necessary for it to establish the fact that he (the drawer) had authority so to put the name of the firm as accommodation endorser.

The court, therefore, under these views, erred in rejecting that mass of testimony, erred in its charge and erred in rejecting a large proportion of the prayers of the defendant based upon the theory of the law which I have indicated. Some of the prayers of the defendant are erroneous for various reasons, but there were prayers enough to justify them to go to the jury upon the theory that I have indicated.

The fifth, sixth and seventh prayers of the defendant were erroneous in this; That they put it to the jury to find that the plaintiff knew or had reason to believe there were these infirmities. That, under the rule as laid down by the Supreme Court of the United States, is not enough. In the case of *Goodman vs. Simons*, the Supreme Court of the United States have said it must be knowledge and not reasonable belief. The facts I have adverted to were competent to go to the jury from which they would have the



right, according to the weight they would give to the testimony on the one side or the other, to determine whether, in point of fact, he had knowledge of the infirmity of the paper, and they had the right to make the deduction, if they so pleased, that he had knowledge, and if they should draw the inference of knowledge from this evidence, which was competent evidence to establish the fact of knowledge, then the plaintiff was not entitled to recover.

With this explanation of the prayers I need not criticize them any further than to say that upon a review of them the court finds, in view of this testimony which ought to have been admitted, that the court below should have granted the first, second, eighth and tenth prayers of the defendant. Those prayers covered the rule of law that I have just announced as being the true rule applicable to such a case, and would have given the defendants the benefit of standing before a jury to argue upon all the testimony as to whether or not the plaintiff, at the time he dealt with this negotiable paper, knew that it was not negotiated for the benefit of the firm and that the firm was an accommodation endorser, and therefore the firm was not to be bound unless knowledge was brought home that the firm had authorized the endorsement for that purpose.

The judgment of the court below will therefore be reversed and the case will be remanded for a new trial in order that on a second trial it may be conformed to the rules which we have laid down as the true rules which govern a case circumstanced as this one is. There were other exceptions in the case, but it is not necessary to advert to them.

ALEXANDER JONES

vs.

THE BALTIMORE &amp; POTOMAC RAILROAD CO.

{ Decided June 1, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

LAW. No. 24,864.

A railroad draw-bridge was erected across the Potomac river by a railroad company under authority of an act of Congress. The statute provided that the company should keep the bridge and draw in efficient working condition at all times. A schooner passing through the draw of the bridge so injured it that it was immediately closed by the company and kept so for four days, during which time the repairs made necessary to the draw were prosecuted with all due diligence. By reason of the closing of the draw, a tug boat was detained and prevented from performing her regular business. *Held*, that she was entitled to recover damages for the detention.

THE CASE is stated in the opinion.

NATHANIEL WILSON for plaintiff:

Those who, for commercial purposes, are using a navigable stream as a highway for vessels have the primary and paramount right thereto; and every obstruction of the navigation thereof, or hindrance to the free passage of vessels upon it, is *prima facie* unlawful. *People vs. Vanderbilt*, 38 Barb., 282; *Davis vs. Winslow*, 51 Me., 268; *Birch vs. Schalf*, 28 Penn. St., 195; *Milwaukee Gas Co. vs. Steamer Game Cock*, 23 Wis., 144.

Private individuals suffering special damage for the unlawful, unnecessary, or unreasonable obstruction of navigable waters are entitled to maintain a civil action against the obstructors. *Pierce on Railroads*, 201; *Thompson on Negligence*, vol. 1, p. 558, and cases there cited; *Riggs vs. Belts*, 22 Eng. L. & E., p. 240; *Rennich vs. Morris*, 3 Hill, N. Y., 621; *Pennsylvania vs. Bridge Co.*, 13 H., 518; *Garritee vs. Baltimore*, 53 Md., 422.

It has been expressly determined by the Supreme Court of the United States that the Potomac is a navigable river, is a part of the *jus publicum*, and that any obstruction to its navigation gives to any particular individual who has sustained

special damage therefrom the right of private action for such special damage. *City of Georgetown vs. Canal Co.*, 12 Pet., 98.

A railroad company being authorized by its charter or by special legislation to erect, or to use and maintain, a bridge crossing a navigable stream, the condition imposed by the law authorizing the structure must be strictly complied with; and the failure to comply gives a right of action to a party who thereby suffers a special damage. *Pierce on Railroads*, p. 202.

The charter or legislative authority for the maintenance of such a bridge is to be strictly construed; nothing is conceded but what is granted in plain terms. *Hughes vs. N. W. R. R. Co.*, 18 Fed. Rep., 113, and cases there cited; *Rogers vs. K. & P. R. R.*, 35 Me., 319; *Dungan vs. Bridge Co.*, 27 Penn. St., 303.

When a railroad company is authorized by charter to erect a bridge over a navigable stream, with power to make repairs, &c., a temporary frame work has been held to be an obstruction, within the meaning of the charter, for which the company would be liable to compensate a person damaged thereby. *Memphis & Ohio R. R. vs. Hicks*, 5 Sneed, Tenn., 428; *Hole vs. S. R. R.*, 6 Hurls. & Nor. (Exch.), 488.

ENOCH TOTTEN for defendant:

The obligation imposed upon the railroad company by this statute is certainly not greater than that imposed upon towns, counties and cities in the United States in relation to bridges. In Massachusetts, Maine and Rhode Island the statutes require the corporations to keep this highways in repair, "so that the same may be safe and convenient for travelers, with their teams, carts and carriages at all seasons of the year." *Angell on Highways*, § 259, note.

A bridge carried away by a flood, must be rebuilt within a reasonable time, regard being had to the importance of the road, the recognition of the work, the opportunity of procuring materials, and other circumstances connected with its reconstruction. *Angell on High.*, § 270; *People vs. Tisdale Turnpike Co.*, 23 Wend., 254; *City of Madison vs. Ross*, 3 Ind., 236; *City of Providence vs. Clapp*, 17 How., 161; *Hall*

*vs. Richmond*, 2 W. & Minot, 344; *Reed vs. Northfield*, 13 Pick., 94; 1 Thompson Neg., 555, note.

Even in cases of injury to passengers by means of an accidental defect in a bridge, the railroad company is not an insurer. It is bound to employ skilful workmen, and to see to it that the bridge has been properly constructed and properly guarded and inspected. Having done this, the company does its whole duty and cannot be held as an insurer; it is not liable for accidents which skill and care are unable to avoid. *Toledo, Peoria & W. R. R. vs. Conroy*, 68 Ill., 560.

In the case of *Townsend vs. Turnpike Road* (6 John., 90), a traveler with his team was passing over a bridge of the defendant, and the bridge broke and fell, killing one of the horses. The proof showed that the defect was latent, and that on the morning of the day of the accident, the bridge had been inspected and some repairs had been put upon it by the defendant. Held, that "the defendants are bound to bestow ordinary care and diligence in the construction and preservation of their bridges. They are not responsible for accidents if those accidents do not arise from the want of ordinary care and skill. See also *Wilson vs. Susq. Co.*, 21 Barb., 79.

The degree of diligence required of toll bridge and turnpike road companies has been held to be greater than that enforced ordinarily, because of the contract relations between the parties and the special consideration paid. *Penn. & D. Canal Co. vs. Graham*, 63 Penn. St., 290.

When a corporation, in consideration of the franchises granted to it, is bound by its charter to keep a road or bridge in repair, it is liable for any injury to a person, arising from want of repair, whether the defect be patent or latent, unless he be in default, or unless the defect arose from inevitable accident, tempest, lightning, or the wrongful act of some third person, of which they had no notice or knowledge. See also *Monongahela Bridge Co. vs. Kirk*, 46 Penn. St., 113; *Penn. R. R. Co. vs. Patterson*, 73 Penn. St., 491.

Where a statute requires the company to make and keep up a fence, it is not to be construed to mean that it shall be

constantly kept up ; that it may not get out of order, without thereby placing the company in the light of violating the statute ; on the contrary, it is well settled that where a proper fence is once made, then if from any cause it becomes defective or insufficient, or is thrown down or left open, that it is the duty of the company to know and ascertain the same within a reasonable time, and thereafter, within a still further reasonable time, to repair or restore the fence to a proper condition.

In such cases, the company is without fault ; and having discharged its duty to the public by making a fence, is, under the statute, not liable for subsequent defects, if diligence has been used to discover and remedy the defect. *Aylesworth vs. R. R. Co.*, 30 Iowa, 459 ; *Lemon vs. Chicago & N. W. R. R. Co.*, 32 Iowa, 151 ; *McCormick vs. R. R. Co.*, 41 Iowa, 193 ; *R. R. Co. vs. Swearingen*, 47 Ill., 206 ; *R. R. Co. vs. Barrie*, 55 Ill., 226 ; *Smith vs. R. R. Co.*, 24 Ind., 162 ; *Swearingen vs. R. R. Co.*, 23 Ill., 289 ; *Hall vs. R. R. Co.*, 88 Ill., 368 ; *Bartlett vs. R. R. Co.*, 20 Iowa, 188 ; *Amslo vs. R. R. Co.*, 47 Ill., 173 ; *Rorer on Railroads*, pp. 640 and 647, 1414.

The case of *Dugan vs. Bridge Co.*, 27 Penn. St., 312, relied upon for the plaintiff, is in favor of the defendant and not against it. The statutory requirement in that case was that the bridge should not be so built "as to injure, stop or interrupt the navigation of said river by boats, rafts or other vessels." It is practically conceded in that case that if the obstruction had been by act of providence or of a third person the company would not be liable. See also *Lehigh Bridge Co. vs. Lehigh Coal Co.*, 4 Rawle, 24 ; *Penn. Canal Co. vs. Graham*, 63 Penn. St., 290.

Mr. Justice Cox delivered the opinion of the court.

This is an action brought by the plaintiff, Jones, as the owner of a steam tug, against the railroad company for keeping the draw of the bridge crossing the Potomac river closed for four days, by reason of which the plaintiff was detained and his tug prevented from prosecuting her regular business on the river. For this he claims damages.

It was agreed that the case should be certified to the General Term, and if the court should be of the opinion that the plaintiff should pay the judgment, that judgment should be entered for \$293.75 with costs.

As set forth in the agreed statement of facts, it appears that the draw of the bridge had been injured by a schooner which passed through it, and that it was immediately closed by the company and kept so for four days, during which time the repairs made necessary to the draw were prosecuted with due diligence, and this tug boat was detained and prevented from performing her regular business during that period of time.

The case seems to have been argued for the defence as if the proximate cause of the injury to the plaintiff was the act of this schooner in passing through this bridge and injuring the draw. That is not the subject of complaint on the part of the plaintiff. The subject of complaint is the closing of the draw by the railroad company—the voluntary closing of it—and the keeping of it closed for a period of four days. We have been referred to authorities holding, generally, that a railroad or bridge company is not an insurer of the condition of the road or bridge at all times and of its fitness for travel; that a company of that kind is simply responsible for due diligence, and in this case it seems that it used due diligence in putting the bridge in repair.

It is claimed that the closing of the draw was necessary in order to make the necessary repairs. It was necessary, it is said, in order that travel over the bridge could be resumed, which was vastly more important than the travel up and down the river.

It does not appear, however, from the facts, that it was at all necessary to keep the draw closed in order to make the repairs, and it does not appear either that it was necessary for the ordinary travel, because *non constat* that the travel might not have been conveyed across the river by a ferry boat. But whether it was or not is immaterial, unless the proposition can be maintained that the right of way over the bridge was paramount to the right to navigate the river,

and that can hardly be said in the face of the law which gives the railroad company the privilege of going over the river, and which says that it shall keep the bridge and draw in efficient working condition at all times.

We think on the whole that the plaintiff is entitled to recover, and the judgment will be entered according to the stipulation.

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MARTIN C. FLANNERY

vs.

THE BALTIMORE & OHIO RAILROAD CO.

LAW. No. 23,444.

{ Decided June 1, 1885.

{ Justices COX, JAMES and MERRICK sitting.

1. The employees of a railroad company constitute the police of the train and the passenger, from the moment he enters the car, is entitled to look to them for protection in cases of assault growing out of the disorderly conduct of another passenger or passengers.
2. When the agents of a railroad company are guilty of malicious or intentionally negligent conduct, so as to amount to a reckless disregard of the rights of passengers, a jury may award exemplary damages; but the court will interfere when such damages are grossly excessive.

STATEMENT OF THE CASE.

This suit was brought to recover damages for an assault committed on the plaintiff while travelling on one of the defendant's trains between the cities of Baltimore and Washington, by one Carroll, a fellow passenger, and a person in nowise known to or connected with the defendant.

At the trial the evidence in substance was that on the 10th of October, 1881, the plaintiff purchased from the agent of the Baltimore & Ohio Railroad Company a return trip ticket, entitling him to a passage over its road to the city of Baltimore and back to Washington; that he left Washington about 6 o'clock p. m. of the same day, arriving in Baltimore on train time; that about eleven o'clock p. m. of the same day he went to the company's depot on Camden

street in Baltimore, intending to take passage for Washington; that the depot was crowded and the cars of the train for Washington full of passengers; that he got upon the platform of one of the cars of the said train and was about to enter when some person unknown to him, and not an officer of the defendant company, said that he (Flannery) could not go in; that on being asked by the witness why he could not go in, the stranger, who had a woman with him, said that he did not want to be bothered with him (witness) at the door; that the stranger threatened to assault him and pitch him off; to avoid trouble witness waited upon the platform of the station and then upon the platform of the car next in front for the coming of the conductor; that in about half an hour the conductor came along, to whom the plaintiff told the fact of his being kept out the car, and asked his safe conduct into the car. The conductor took his ticket, and told witness to follow him into the car; that he did follow the conductor into the car, and when he had got about 12 or 15 feet from the door, having found a place, where there was plenty of room, he saw approaching him the man who had prevented him from entering the car; that the man caught hold of witness by the collar and said that he must leave the car; witness claimed his right as a passenger and argued that he was acting as a gentleman and in a peaceable way; that the man said he didn't care a damn, and that witness would have to leave the car, and seized the witness; that as he did so witness called upon the conductor several times, who was then a short distance off collecting fares, for protection, and the conductor said that "if I didn't stop my damn mouth he would pitch me off the train," whereupon the assailing parties re-attacked witness and beat him off the car and the conductor knew of it; that witness was cut about the face and was bleeding and stunned; that he remained on the platform until he reached Washington about two o'clock a. m. of the eleventh of October, 1881; that when he got to Washington he went home, and in the morning went to Dr. Bowen's office and had his wounds dressed and attended to.



On cross-examination the witness stated that at the time of his going to Baltimore the "Oriole" was being celebrated in that city; that there were a great many returning to Washington that night; that the depot, the depot platform, and the cars were full of people; that he had never seen his assailant until he was prevented by him from entering the car as stated in his direct examination; that his assailant swore at him, and said: "Damn you, I will pitch you off the train," and "that if he had no lady with him he would pitch him off the train," and that he also said to witness: "You insulted that woman" (the woman with stranger).

The plaintiff then offered as a witness one Nelson Levy, who testified that: "A friend of mine and myself were visiting the Baltimore Oriole; we came back on the last train, and met Mr. Flannery, the plaintiff, on the platform of the car; the car was well crowded, and the crowd on the inside of the car would not let us in; we had to ride a considerable distance until the conductor came along; the conductor said: 'If you follow me you can go inside.' We went in with the conductor; there a disturbance arose, and I found out that Mr. Flannery had been assaulted; the scuffling took place in one half minute after we entered; the conductor was then standing by me; I heard Mr. Flannery call for assistance from the conductor several times, and the conductor answered several of these appeals in the same way, and said: 'If you don't shut your damn mouths, I will stop the train and put you all off.'" Witness at the time was seated several seats from where Flannery was standing; that he did not see Flannery after entering the car; that he did not go to his assistance, being himself a cripple; that he saw him next morning, and his face was bandaged up.

Dr. C. H. Bowen, as a witness for plaintiff, testified, that on the 11th of October the plaintiff called at his office for treatment; that he had cuts, lacerations and contusions on the head, face and scalp, and was cut through his lip and

tongue and head and an incision under the left eye and lip, and that he attended plaintiff and treated his wounds for about thirty days.

William Dunn testified, that in 1881, at the time of the Baltimore Oriole, he saw Mr. Flannery at the Baltimore & Ohio depot in Washington city on the arrival of the train from Baltimore at night, looking as if he had been roughly handled; that he had several wounds on the face and cheek, his clothing was torn, and he appeared to be chilled through.

The plaintiff having closed his case; the defendant then offered as a witness A. E. Bowen, who testified, that he was the conductor on the train upon which the plaintiff was at the time of the alleged assault; that as the train was a very long one, and the cars very much crowded, he authorized Henry Worthington, a sleeping-car conductor, to collect the tickets on the three parlor cars attached to the train.

The defendant then offered Henry Worthington as a witness, who testified, that he was authorized by Conductor Bowen to collect, and did collect, on the occasion in question, the tickets on the three parlor cars; that after he had, in the course of collecting tickets, gotten about one-third of the way in the middle parlor car, he heard some one call to the conductor, "I claim your protection;" that the call was repeated several times; that he immediately turned around towards the end of the car from which the call came and said, "if the parties who are making the noise did not immediately quit, he would stop the car and put them all off;" that the noise and disturbance seemed then and there to cease, but that he did not attempt to go to the assistance of the party who called on him for protection because, believing it was all over, he went on collecting the tickets; that he did not know who called for protection; that he did not see any one who had been hurt on the train that night, and did not hear that any one had been hurt on the train until some days afterwards; that he afterwards understood that the man who had the difficulty with the plaintiff was

named Carroll, and that he is now dead; that he was in no way connected with the company; that the witness is still in the employ of the defendant.

The defendant offered James L. Barbour, Dr. C. W. Franzoni, B. F. Summy, William Wattington, and John B. Ulrich as witnesses, who testified that they were on the same car with the plaintiff on the occasion named; that they were returning from the Oriole, and the train on which they were was the last train that night; that it was very crowded; that they were seated about the middle of the car; that they heard no unusual disturbance, and knew of no assault until after they had reached Washington; that the conductor, or person acting as conductor, was polite, attentive and gentlemanly.

The evidence being closed upon both sides; the court thereupon, of seven prayers asked by the defendant, granted the fourth, which was as follows:

"That, in order to entitle the plaintiff to recover, the jury must be satisfied by a preponderance of testimony that the conductor or person acting as conductor had notice before the assault or in time during its progress to have prevented the injuries of which the plaintiff complains, by the exercise of due diligence."

And also the seventh, with the modifications as indicated in brackets:

"That in order to entitle the plaintiff to recover the jury must be satisfied, by a preponderance of testimony, that the conductor, or the person acting as conductor, had notice before the assault or in time during its progress to have prevented [or mitigated] the injuries of which the plaintiff complains, by the exercise of due diligence [and that, having such notice, he gave no proper order and took no proper action to give protection to the plaintiff]."

The court, thereupon, upon its own motion, instructed the jury as follows, to wit:

1. "If the jury believe from the evidence, that on the night referred to in the testimony, the plaintiff was a

passenger on board the defendant's train from Baltimore to Washington; that the plaintiff, while conducting himself in an orderly manner, was assaulted by a fellow-passenger; that he thereupon called repeatedly for assistance on the conductor, who was then collecting tickets in the same car; that the conductor heard the call more than once, and saw the scuffle; that he did not go towards the plaintiff in compliance with his appeal for help, but replied to such calls with language to the effect that 'if they did not stop their damned noise he would stop the train and put them all off,' and continued on through and out the car without attempting to give the plaintiff any assistance, or to remove the attacking party from the car; and shall further believe from the evidence that after the plaintiff had made the said calls for assistance, and the conductor had made reply as before stated, the plaintiff was further beaten and forced out of the car by his assailant, then the plaintiff is entitled to a verdict."

2. "If the jury shall further believe from the evidence that before the plaintiff had entered the car he informed the conductor that he had already been prevented from entering it by one of the passengers, and that shortly after he entered the car behind the conductor he was again assaulted by the same passenger, and thereupon repeatedly appealed to the conductor for assistance; and that his cries were so frequent and of such a character as reasonably to apprise the conductor that an assault was being committed, and that the conductor's interference was needed to stop it; and shall further believe that the conductor absolutely neglected and failed to interfere, and that such neglect and failure was wilful, or was the result of such reckless indifference to his duties, and to the rights of the plaintiff and the other passengers as, in the opinion of the jury amounted to an intentional violation of them, and was accompanied by the use of insulting or offensive words, addressed to the plaintiff in the presence of the other passengers; and that the conductor left the car without any further inquiry or interference than to make use of the expressions before referred to,

and did not enter it again during the remainder of the trip ; and shall further find that the said Worthington was and is still retained in the service of the defendant company ; and if the jury shall further believe that the damages the plaintiff is entitled to recover as compensation for the physical and mental injury sustained by him would not be sufficient to punish the defendant and serve as a warning for the future, and that such punishment ought justly to be visited upon the defendant, then the jury is instructed that they are authorized in their discretion, to give such additional damages for the sake of the public example as they may think the circumstances of the case require."

3. "The jury are further instructed that they should be very cautious in the exercise of their authority to give exemplary damages, under the circumstances set forth in the second instruction, and should allow no greater sum as exemplary damages (if they should award such damages) than is just and reasonable, and should not permit their judgments to be so swerved by passion as to render an oppressive or unreasonable verdict."

To all of these instructions the defendant severally excepted.

The court charged the jury as follows :

"GENTLEMEN OF THE JURY: The case is an important one, and it has been carefully argued. Its trial has been conducted with such deliberation that almost all the points which are really involved have been explained to you. Therefore I conceive I can add very little to the language of the instructions. I shall, however read them anew and make a few remarks on the subject. Here the justice read the court's first instruction. Now, gentleman that is the general law of the case, which is based on the idea that the railroad company and its employees are the police of the train. A passenger does not enter the depot or that part allotted to the cars, except by presenting his ticket. [He goes in there and takes his seat in the car. From that moment the police of the city, where he lives, are left behind

him and the employees of the company constitute the police upon whom the passengers are dependent for their protection.] This case, of course, is not to be tried in a different way because the plaintiff, if there were evidence on the point, is a poor man or a rich man. It is to be tried just as if the plaintiff had been either one of the distinguished counsel who had been injured. The law is that an orderly person, under such circumstances as these shown here, places himself under the charge of the conductor and employees of the company, they are the police upon whom devolves the duty of seeing that he shall be protected and that he travels in safety, which is the purpose for which he got on the train. It has been argued by the counsel for the defendant that if you believe the conductor, when he was called upon, made the threat that unless the noise ceased he would put those people off, and if you further find that he believed that was all that was necessary for him to do, then he had discharged his duty—in other words that his belief was the measure of his duty.

Mr. MERRICK. "I said that if the conductor ordered the noise to cease and it was then suspended, and he believed the disturbance was over, then he had done his duty." This correction was assented to by the court.

"This I conceive to be an incorrect statement of the law. The question as to what was his duty is one of fact. It was not sufficient for him to say that he believed that that was all that was necessary. Was the reiteration of the cry for assistance, and the manner of the cry, and the circumstances surrounding it, sufficient to induce the conductor reasonably to believe that his interference was requisite to stop the quarrel that was going on in the car? It is also argued that it would make a difference in some way, probably upon the question of damages, if the jury should think that the plaintiff was the aggressor and a wrong-doer in the preliminary trouble on the platform of the car. It is for you to determine whether there was proof that he was a wrong-doer at this period. The evidence on that point comes

from the plaintiff himself, and he positively denies any such imputation. Mr. Levy says he saw nothing in the man's conduct, at any time, except that of a gentleman, and the conductor, himself, does not say that he was misbehaving himself. But it is argued that you may infer that he had given some serious offence because the plaintiff admits that his assailant had accused him of having insulted a lady.

["I say, in reference to that, that when you are considering whether such an inference may be made by you, you will remember that this circumstance was testified to only by the plaintiff himself, who denies positively that there was any truth in the man's charge. It would be a most curious conclusion to say that the plaintiff was the aggressor in the quarrel, when, according to his statement, which is the only testimony on the subject, it was forced upon him by his assailant. Suppose the plaintiff had testified that the man, in commencing the quarrel, had prefaced it by saying "You are the man who shot Garfield," would you be justified in concluding, from the fact that the man did make that charge, that it was true? Of course this is rather an exaggerated illustration, but it serves to explain my meaning.]

["You are to take into consideration all the facts. It is your duty to consider every particle of the testimony; every thing adduced by the defendant, as well as by the plaintiff; but you are not to imagine things of which there is no proof at all. You are not to conjecture this, that, or the other, for the reason that your oath is to decide the case according to the evidence. You would have no right even to act upon any circumstance connected with the case that one of you may know, unless it has been given in proof on the witness stand,]

"These remarks apply specially to the first instruction, which refers more particularly to the question of responsibility and duty. Next, as to the matter of damages, which is explained in the second instruction. Ordinarily it is the duty of the jury to find a verdict in an amount which they believe would fairly compensate a plaintiff for injuries sus-

tained. There are cases, however, where the jury can go beyond this for the sake of public example. In such cases they have the right to give larger damages than they believe would serve merely to compensate for the individual injury. Now, I have here stated, as carefully as I could, the conditions surrounding this branch of the case (reading from second instruction to the words 'and that the conductor's interference was needed to stop it.')

"[I pause here to state, what seems to me to be the proper rule on that subject, that it would not be enough for the conductor to say: 'When I told those people I would put them off the car, I believed that threat would be enough.' It is not sufficient for the conductor to content himself with this, because it would create a measure of duty which would be an extremely insufficient one, since the conductor might be very stupid about it, and satisfy himself too readily, and without due consideration that his mere threat would suffice to allay the discord.] The inquiry would rather be as to the actual appearance of affairs then before him.

"What was the nature of the call? Was it only indicative of some trivial disturbance, or was it of such intensity and earnestness, and so often repeated, as would reasonably apprise him that an assault was being committed, and that his assistance was needed (reading again, commencing: 'And shall further believe,' &c., to the words 'amounted to an intentional violation of them'). That is again a test. [If you find he acted in such a careless manner, and with such reckless indifference as showed that he didn't care about the rights of the man at all, and if you believe that was the state of mind in which this appeal was rejected by the conductor (reading again to the words 'and shall find that the said Worthington is still retained').]

"[In reference to that I say it appears that he is now clerk of this defendant in its parlor-car factory. It is fair that you should take this circumstance into consideration in determining whether or not the company condemned his act as conductor, though they still retained him in another capacity.] (Reading rest of instruction.) [You observe it



is left to your discretion, if you shall find such facts as I have set forth here, and if you should come to the conclusion that the damages which would merely *compensate* plaintiff for his injuries would be insufficient as an example, and that this was a case you should find a verdict by way of example, then you are at liberty to no further and give him additional damages, which are indifferently called exemplary or punitive damages, or smart money.] There is another designation, sometimes used '*vindictive*' damages, which, I confess, has an unpleasant sound in a court of justice. Now the question is, what should you do about the amount of the damages? With reference to that question I say (reading third instruction) you are not trying in this case, gentlemen, to wreak vengeance on any body. You are to do justice in the matter between these parties; [and the consideration that this is a corporation should not weigh with you one particle beyond what is just and reasonable.]

"I think it also my duty to say that the company should not be held answerable for the language of the counsel for the defendant in his treatment of the case, if you should think he has been unreasonably severe upon the plaintiff here. We are talking now of what occurred in 1881, and not of the conduct of the company's agents since that time.

"There is another remark I will make in reference to an argument of the counsel for the plaintiff that the test of the amount you should award in this case is to put yourselves in the position of the person injured, and conceive what sum would induce you to submit to such treatment. It is true, this idea may find a place in the formation of your judgment, but, of course, it cannot be a conclusive test in such a case. [There may be jurors who would not endure to be struck an insulting blow for a million of money, but it does not follow that a blow inflicted by one man on another should, therefore, entitle every plaintiff to a verdict from such a juror for such an amount.]

"So you observe that that is not a fair test always. There

are two instructions granted with some modifications, at the instance of the counsel for the defendant. (Reading fourth prayer of defendant.)

"That is common sense and I grant the instruction for the reason that the conductor might be out of the car when one man may strike another. You cannot expect a conductor to stand at the back of every seat and prevent such things as that from occurring. The case for recovery must be such an one as it is insisted is shown here. Where the conductor had notice that the fracas was going on, and could, by his interference, have stopped it, or at least mitigated it, then the question is, whether he gave a proper order and took proper means, because merely to give an order to stop might be totally inefficient.

(Reading seventh prayer for defendant.)

"That I grant you are to take into consideration all the circumstances."

To such parts of the charge as are enclosed in brackets the defendant also excepted.

The jury found for the plaintiff and returned a verdict for \$5,000.

H. O. & R. CLAUGHTON for plaintiff:

Whether exemplary damages is merely compensation, or punishment, it is now universally recognised and established that in all actions on the case for tort a jury may inflict them. 2 Sedgwick, 456 (side page) *et seq.* to 467; Milwaukee R. R. Co. v. Armo, 1 Otto, 465; Day v. Woodsworth, 13 How., 363; Phila., W. & B. R. R. Co. v. Quigley, 21 How., 202; Valtz v. Blackmar, 64 N. Y., 440; Hoadley v. Watson, 45 Vt., 289; McWilliams v. Pragg, 3 Wis., 429; Hawes v. Knowles, 114 Mass., 518.

Criminal indifference to duty amounts to "evil motive." B. & Y. Turnpike Co. v. Boone, 45 Md., 344; Magee v. Holland, 3 Dutch, 86.

Gross negligence. Railroad Co. *vs.* Lockwood, 17 Wall., 357; Prickett *vs.* Cook, 20 Wis., 358.

Principal for default of agent, without authorization or ratification. *Goddard vs. Grand Trunk R. R. Co.*, 57 Me., 202; *Atlantic and G. W. Co. vs. Dunn*, 19 O., 162; 86 Ill., 455; 114 Mass., 518.

If the jury find a proper case for exemplary damages, the jury have the right to fix the amount, which will not be disturbed unless so disproportionate as to warrant the belief that the jury must have been influenced by partiality or prejudice. *Hilliard on New Trials*, 562, *et seq.*

In general, where there is no certain measure of damages, the court will not disturb the verdict, except for prejudice, passion, or corruption in the jury, and where the verdict is palpably against the evidence. *Id.*, 563, 567, 578.

If the conductor authorize another conductor in the service of the company, and wearing the uniform of the company, to act for him, the company is liable for the negligence of such employee. *Carson vs. Leathers*, 57 Miss., 650.

If he had no power to stop the train, it is admitted that it was his duty to notify the conductor of the assault. It amounts to the same thing.

The case in 34 Connecticut, *Flint vs. Transportation Co.* was a case of exemplary damages, and was decided by a U. S. court. 13 Wall., 3.

R. T. MERRICK and GEORGE E. HAMILTON for defendant:

The allowance of exemplary damages is the exception and not the rule. In many of the States it is held that such damages should not be allowed unless the injury complained of is the result of the *wilful* and *malicious* act or conduct of the agent authorized or approved by the company. *Cleghorn vs. R. R. Co.*, 56 N. Y., 44; *Travers vs. R. R. Co.*, 63 Mo., 421; *Bass vs. R. R. Co.*, 42 Wis., 654; *R. R. Co. vs. Hammer*, 72 Ill., 347.

And the extreme limit to which the courts have gone in the direction of favoring exemplary damages in such cases has been to hold that the allowance by way of damages of anything more than a fair and adequate pecuniary indemnity for the wrong or injury suffered should never be made,

except in cases when the injury complained of has been inflicted *maliciously or wantonly*; that the wrong must be aggravated by the evil motive, and on this rests the rule of exemplary damages. *R. R. Co. vs. Larkin*, 47 Md., 155; *R. R. Co. vs. Armes*, 91 U. S., 489.

Mr. Justice Cox delivered the opinion of the court.

This is a case in which the plaintiff went upon the cars of the defendant and on first attempting to enter was forbidden to do so by another person. He appealed to the conductor, who took him into the car and gave him a seat. Immediately afterwards he was assaulted by this other man, and he says he appealed to the conductor for protection, but instead of protecting him he says the conductor insulted him, and left him to his fate, and he was ejected from the car in a rather pitiable condition.

We have gone over this case generally, and have examined the instructions given by the court, and do not find any error in the ruling of the court on the whole question presented. One of the principal questions submitted was whether exemplary damages could be awarded by the jury in favor of the plaintiff. We are not favorable to the doctrine of exemplary damages against a corporation, but we cannot close our eyes to the fact that the Supreme Court has recognized with approval the decisions of the State courts to the effect that when the agents of a railroad company are guilty of conduct which is malicious or is intentionally negligent, so as to amount to a reckless disregard of the rights of passengers, a jury may award exemplary damages, and we think that the law, as applicable to the facts in this case, was properly presented by the court to the jury. There was evidence tending to show, in the case under consideration, that the agent of the defendant was guilty of wilful and intentional neglect. There is, however, one question still left open. A motion was made for a new trial in this case on the ground of excessive damages. That motion was overruled and an appeal was taken which brings before us the question of excessive damages.

The jury awarded the plaintiff in this case in their verdict, damages to the amount of five thousand dollars, at least ten, if not twenty times, as much as would have actually covered all the damages he received and would have been ample compensation to him we think. All in excess of this is merely a fine imposed upon the company which goes into the pocket of the plaintiff.

It is claimed that where exemplary damages are given by a jury the court will not interfere in the matter. The court does hesitate to interfere in this respect, particularly in certain cases, such as slander, libel, &c. In those cases we seldom interfere with the verdict rendered by a jury, where the damages are almost always exemplary. Still, when we think the verdict rendered, is out of all proportion to the injuries received, we feel it our duty to interfere. In this case we do not hesitate to say that we regard this verdict as grossly excessive. We think that five hundred dollars would have been an ample amount for the injury sustained, and we regard all in excess of that amount as merely a punishment of the defendant. We have therefore concluded to grant a new trial unless the plaintiff will remit thirty-five hundred dollars of the amount awarded and let the verdict stand at fifteen hundred dollars.

## CAROLINE GROSS vs. FRANK M. GOLDSMITH.,

LAW. No. 25,298.

{ Decided June 1, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

1. Justices of the Peace in the District of Columbia have jurisdiction to issue attachments for rent under the provisions of sec. 679 R. S. D. C.
2. Where an attachment is issued for rent, part of which is due and part not due, and there is no averment, as required by the statute, in the affidavit upon which the attachment was issued, that the tenant was about to remove the goods, &c., the attachment will be void as to the rent not due, but will be allowed to stand as to the rest.

With this case was heard the case of *Fitch et al. vs. Hecht*, involving the same point.

THE CASE is stated in the opinion.

N. H. MILLER for plaintiffs.

B. F. LEIGHTON and HENRY WISE GARNETT for defendants.

Mr. Justice COX delivered the opinion of the court.

These two cases present one question of importance applicable to them both, and that is whether a justice of the peace can issue an attachment for rent—a question which does not seem to have been decided by this court before.

The principal argument against the right of a justice of the peace to issue an attachment for rent is founded upon the language of the general attachment law of 1866, which provides that writs of attachment and garnishment shall be issued by the clerk of the Supreme Court of the District. It is supposed that this limits the authority to the clerk of the court. It will be remembered that the attachment law before that date was very imperfect. We had only the attachment law of Maryland, and that allowed the plaintiff to procure an attachment from the clerk of the court, only upon the warrant of a justice of the peace or a judge of the old circuit court, and on the defendant's appearance the attachment was dissolved. The act of Congress of 1866 is entitled, "An act to more clearly define and ascertain the powers of the Supreme Court of the Dis-

trict of Columbia ;" and it amends the old law by providing that an attachment may be issued at any time, at the commencement, or during the progress, of a suit, whereas formerly it could only be issued at the commencement. It also allowed it to be issued by the clerk without any warrant, and when the attachment is served, it is not discharged by the defendant's appearance, but, as the language is, "it shall not be discharged except on the filing of a bond, &c."

Undoubtedly that law had reference to nothing but a process from the Supreme Court of the District of Columbia. It had no reference to rents particularly, or to the relation existing between landlord and tenant, but applied to all cases. But a year after that was passed the Landlord and Tenant Act, ch. 19, R. S. D. C., which embraces a different subject and offers an entirely different remedy. That commences by saying that:

"The power claimed and exercised as a common right by every landlord, of seizing, by his own authority, the personal chattels of his tenant for rent arrear is abolished."

We know that the landlord possessed that power of distraining, without any reference at all to the amount of indebtedness for rent. He had as much right to distrain for rent amounting to less than fifty dollars as for a sum over that amount. And yet the remedy is swept away in all cases by this act of Congress.

Then the next section provides—and this evidently was intended as a substitute for the remedy which was taken away, and the presumption is that the substitute was intended to be equally extensive with the remedy which was destroyed—that:

"The landlord shall have a tacit lien upon such of the tenant's personal chattels, on the premises as are subject to execution for debt, to commence with the tenancy, &c."

Now that is equally comprehensive with the first clause ; that is to say, it applies to all cases where the relation of landlord and tenant exists, and that without reference to

the amount of rent due. So that a landlord, whose rent is in arrear to the extent of only fifty dollars, has just as much a tacit lien on the tenant's goods as another landlord who has a claim of a larger amount.

Then this lien may be enforced, first, by attachment, to be issued upon affidavit, &c.; second, by judgment against the tenant, and third, by judgment against a third person.

The act does not declare in what tribunal the attachment shall be sought, neither does it say in what tribunal this judgment can be recovered against the tenant or a third person. So that we are referred to some legislation outside of this for the ascertainment of that question. Well, we find on March 11, 1823, that an act of Congress 3 St. at. L., sec. 6, p. 744, entitled "An act to extend the jurisdiction of justices of the peace," &c., provided:

"That the judges of the Circuit Court of the District of Columbia [whose powers we have succeeded to] shall not hold original plea in the said court of any debt or damage in cases within the jurisdiction given to justices of the peace by this act, which shall not exceed fifty dollars, exclusive of costs."

That law is still in force and binding on this court. We cannot entertain any plea of debt or damage which shall not exceed fifty dollars in amount. An attachment is a suit *in rem* founded on a personal indebtedness, and only sustained by proof of that personal indebtedness; and under the provisions of that law we could not entertain an attachment for the sum of fifty dollars or less. But a landlord has, under this Landlord and Tenant Act, an absolute right to sue in any one of three forms, viz., first, by attachment against the tenant; second, common law action against the tenant, or third, action against a third person. He must have a remedy by one of these three methods, and the only remedy is found in a justice of the peace's court. Therefore, as a matter of implication, we conclude that a justice of the peace has a right to issue an attachment in the case of a small debt due for rent.

There is a nearly analogous case in the powers invested



in justices in reference to executions. Before the revision of 1874, under the same act which I have already referred to, justices of the peace could issue writs of *capias ad satisfaciendum* and writs of *fi. fa.* to be levied on the goods and chattels of the defendant, and that was the extent of his power as to executions. Now this revision adds words which change the matter entirely. It provides, sec. 1019, R. S. D. C., that: "The plaintiff is entitled to have his execution against the goods and chattels, lands and tenements, rights and credits, of the defendant, subject to the exemption mentioned in section seven hundred and ninety-seven."

We know that a writ of *fi. fa.* cannot be levied against credits, and therefore we have inferred that the law conferred on a justice of the peace the right to issue attachments by way of execution, and that has been uniformly practiced. This is a remedial statute, and ought not to be construed strictly, but to have a liberal construction; and we are satisfied that the impression the court first entertained on this subject was right, when the court, in its scale of fees to be allowed justices of the peace, provided fees for this very matter of issuing attachments for rent. We are satisfied, therefore, that the court below was right in holding that a justice could issue attachments, and that his process could not be quashed for want of jurisdiction in either of these cases.

In the case of Gross against Goldsmith another question was presented. It seems there that the attachment was for two months' rent—one of which was not due, and the affidavit for attachment did not contain the averment required by the act as to rent not yet due, namely, that the tenant was about to remove his goods, &c. Accordingly it was claimed that the attachment could not have been issued for that second month's rent. The court allowed that claim, and held that the attachment was void in consequence of being issued for rent, a part of which, on the very face of the matter, was not due, and could not have been sued for, nor attached for, at that time, and an appeal was taken on that question.

As an original question, I do not know but that I would

hold the same view. But I find that the Maryland authorities (*White vs. Solomon*, 1 Gill, 372, and *Dawson vs. Brown*, 12 Gill & J., 53), hold that the attachment is not to be dissolved or quashed on the ground that it could not have issued for every part of the debt claimed, but it will stand for that part in respect to which it could properly issue. Therefore we overrule the decision of the court on that question.

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MARY ANN GIBBONS vs. JANE OWEN MAHON.

EQUITY. No. 8,914.

{ Decided June 1, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

A testatrix bequeathed two hundred and eighty shares of stock in a gas light company in trust to pay the dividends "without diminution of principal," to his daughter for life. The company having from its earnings doubled its original plant, issued, after the death of the testatrix, additional shares of stock representing this increase in the capital; and these shares it divided among the stockholders in proportion to the original stock owned by them. The *cestui que trust* claimed these additional shares absolutely on the ground that they represented the profits or earnings of the original shares and were in effect dividends. *Held*:

1. A corporation has a right, within reasonable grounds and in good faith to reserve and apply the profits to the increase of the plant, and the stockholders hold their stock subject to this right.
2. That certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue, therefore, of this new stock, the stockholder held precisely the same interest in the increased plant, and in the capital that he held afterwards. The new shares were but a new representation of that interest, and not an increase of it. A dividend is something with which the corporation parts, but they parted with nothing in issuing this stock but an evidence of an ownership already existing. Being, therefore, in no sense, dividends, the duty of the trustee was to hold them, together with the original shares, for the benefit of the remainderman, paying only the dividends upon the whole to the life legatee.

THE CASE is stated in the opinion.

RIDDLE, DAVIS & PADGETT for complainant:

By the terms of Mrs. Smith's will, the defendant holds the original 280 shares "for the advantage and behoof" of the complainant, whom the will entitles to receive the dividends of those shares, as such dividends accrue during her lifetime.

"Dividends," as used in the will, is unqualified; it includes, in its technical sense, as well as in its ordinary and common acceptation, all distributions to corporators, of the profits of the corporation, whether such distributions are large or small; or whether made at long or short intervals; and without any regard to the manner or place of their declaration or mode of payment. *Clarkson vs. Clarkson*, 18 Barb., 646, 657. *Hooper vs. Rossitor*, 1 McClel., 536.

The new shares are in effect and in substance a stock dividend. *Daland vs. Williams*, 101 Mass., 574. *Rand vs. Hubbell*, 115 Mass., 461. *Bailey vs. R. R. Co.*, 22 Wall., 635-6.

And the tenant for life of stock is entitled to all dividends declared thereon during his life, irrespective of the time when they were earned, provided only that they do not impair the capital of the trust fund. *Bates vs. MacKailey*, 31 Beav., 280; *Richardson vs. Richardson*, 75 Me., 570; see *Goodwin vs. Hardy*, 57 Me., 143; *Jermain vs. Lake Shore Co.*, 91 N. Y., 483; *Paris vs. Paris*, 10 Ves., 185.

J. HUBLEY ASHTON for defendant:

The term "dividends" was evidently used in the will in its ordinary acceptation of moneys paid out of profits by a corporation to its shareholders.

The rule is that when a testator uses a word which has a well known ordinary acceptation, it must appear very certain that he has said, on the face of the will, that he uses it in another sense, before the ordinary sense can be interfered with. Lord Cranworth in *Hicks vs. Sollett*, 3 De G. M. and Gor., 793.

The term "dividend," when applied to corporate stock, has a well understood signification, and imports only a di-

vision of money from what the corporation has determined to be income; and that is the legal meaning as well as the popular acceptance of the term. Bradley, Ch. J., in *Taft vs. R. R. Co.* (8 R. I., 333), defines the term, thus:

"A dividend is money paid out of profit by a corporation to its shareholders."

And see *Lockport vs. Van Alstyne*, 31 Mich., 79; *Hyatt vs. Allen*, 56 N. Y., 550; *Kings vs. R. R. Co.*, 29 N. J. L., 87.

A stock dividend, as it is called, is, in fact, no dividend at all, and is merely a dilution of the shares as they existed before. *Williams vs. Western Union Tel. Co.*, 93 N. Y., 162; *Taylor on Priv. Corp.*, sec. 801.

But whatever interpretation is placed on the term "dividends," as used in this will, and whatever it may be deemed to embrace, it is clear, under the provisions of the will, that it does not include any newly created shares awarded to the defendant upon an increase of the capital stock of the corporation.

1. The 280 shares held by the testatrix at the time of her death are bequeathed to the defendant upon the trust, during the life of the plaintiff, to cause the "dividends" to be paid to her "without percentage of commission or diminution of principal;" and it is directed that, after her death, the stock and income are to revert to the estate of defendant "without encumbrance or impeachment of waste."

This is not a gift of the stock to the plaintiff; as is well settled. *Read vs. Head*, 6 Allen, 177; *Barrus vs. Kirkland*, 8 Gray, 512; *Atkins vs. Albree*, 12 Allen, 361.

The bequest to the plaintiff is of the "dividends" or "income" only for life.

The legal property in the shares and the interest they represent in the corporation, its property and franchise, is vested in the defendant by the will.

It is only after a dividend has been made by the corporation from what it has determined to be income, that the plaintiff has any right or is in a position to claim anything.

A testator who gives personal property in this manner is

held to have the interest of the successive takers equally in view. *Kinmouth vs. Brigham*, 5 Allen, 270.

This will plainly shows that the testatrix intended that the interest in the corporation bequeathed to the defendant should not be impaired during the life of the plaintiff; that no part of it should be diverted from the defendant; and that the whole should go intact to defendant absolutely after the death of the plaintiff.

2. It is demonstrably clear, under the will, as thus analyzed, that all new shares awarded to defendant on an increase of the capital stock, in whatever manner or with whatever intent such shares may have been issued, constitute an integral part of the capital bequeathed to her in trust and belong to her absolutely on the death of plaintiff.

The existing shares of the capital stock of a corporation represent all its capital; and within the designation of the capital of a corporation is embraced not only its capital stock, but all its property, real and personal, constituting the assets of the corporation, including (as said by the Supreme Court of Massachusetts) "money earned by the corporation, unless and until distributed among the stockholders by the corporation." *Gifford vs. Thompson*, 115 Mass., 478; *New Haven vs. City Bank*, 32 Conn., 106; *Morawetz, Priv. Corp.*, sec. 348.

The capital of a corporation thus includes its capital stock, while the capital stock embraces only indirectly the capital.

The capital of a corporation thus defined is its property, but each shareholder has a vested interest in that capital in the proportion of the shares held by him to the whole number of the outstanding shares of the capital stock of the corporation. *Lowell, Transfer of Stock*, sec. 4.

That interest, as the Supreme Court has often said, is a distinct and independent interest held by the shareholder, and in his property, and the certificate of stock is the muniment of his title and the evidence of his right. *Van Allen vs. Assessors*, 3 Wall., 573; *Farrington vs. Tennessee*, 95 U. S., 686; *Kent vs. Mining Co.*, 78 N. Y., 159; *Weatherby vs. Baker*, 35 N. J. Eq., 505.

If, therefore, the capital stock is increased by the proper authorities, the right to take the additional shares vests in the shareholders *pro rata*; and when new stock is issued to share equally with the existing stock, it is the right of each shareholder that it shall be so distributed as not to divest him of his vested proportionate right in the corporate property, including the accumulated profits.

This doctrine, first declared in *Gray vs. Portland Bank*, 3 Mass., 364, may now be regarded as settled in the law of private corporations. *Eidman vs. Bowman*, 58 Ill., 444; *State vs. Smith*, 48 Vt., 266; *Dousman vs. Wisconsin, etc., M'fg Co.*, 40 Wis., 418.

This right of the shareholders, in respect to new shares issued on an increase of the capital stock of a corporation, is a benefit or interest which attaches to the old stock, not as profit or income, but as inherent in the shares in their very creation. It is an original incident or attribute appertaining to each share—a right to a larger participation or ownership in the capacity of the corporation to earn profits, and not the gain or income itself actually earned by the corporation. *Gray vs. Portland Bank*, 3 Mass., 364; *Atkins vs. Albree*, 12 Allen, 361.

It follows from these principles that, by the bequest of the legal property in the original shares, the defendant became vested with the legal right to receive, and hold, under the will, as part of the *corpus* of the trust property, a proportionate number of any new shares distributed by the company among the stockholders.

That right was an interest or benefit which appertained to the old shares in their original creation, and passed to the defendant by the bequest of those shares, and can no more be diverted from her than any portion of the 280 shares named in the will.

It is obvious that the new shares must be added to the old in the hands of the defendant as capital, in order to execute the intention of the testatrix, as above indicated in regard to the interest held by her in the corporation at the time of her death.

Where new stock is created and the number of shares increased, each share becomes a less proportion of the whole stock than it was before, so that the original shares represent a smaller fractional interest in the corporation, its franchises and property, than they did before the increase of the capital stock. *Leland vs. Hayden*, 102 Mass., 542.

It is necessary, therefore, that the new shares be added to the old in the hands of defendant as capital, in order that she may retain the same proportionate interest in the whole corporation that she previously held, and that the interest bequeathed by the will may be preserved for the benefit of defendant, as legatee in remainder, after the decease of the plaintiff, in conformity with the intention of the testatrix.

Mr. Justice JAMES delivered the opinion of the court.

This was a bill filed to obtain the construction of a will. The case was heard on bill and answer. It appears that the late Ann W. Smith, of this District, left by her will, among other things, 280 shares of the stock of the Washington Gaslight Company to Jane Owen Mahon in trust for the complainant. The paragraph of the will referred to is as follows:

"I hereby give, devise and bequeath to my daughter Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gaslight Company [and some other things] in trust for the advantage and behoof of my said daughter Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds and income, shall revert to the estate of my said daughter, Jane Owen Mahon, without encumbrance or impeachment of waste."

The answer shows that the accumulated profits of the gas

company were, from time to time, expended in extending the plants of their works, and that in the meantime dividends were declared and paid, and that the latter were regularly paid over to the *cestui que trust* by the defendant.

After the plant had accumulated so that it was double its original value, Congress, by the act of May 24, 1866, increased the capital stock of the gaslight company to one million dollars, for which the company was authorized, of course, to issue stock. Two hundred and eighty additional shares were issued to this trustee, and upon the whole, the original and the new two hundred and eighty shares, she continued for some years to pay the dividends to the *cestui que trust*. But now the *cestui que trust* claims that these two hundred and eighty shares should be transferred to her on the ground that, as they represent profits earned and declared by the company, they really belonged to her under the terms of the will.

As a proposition of law, a corporation has a right, within reasonable grounds and in good faith, to reserve and apply its profits to the increase of the plant, and the stockholders hold their stock subject to this right. The company is the legal owner of the whole plant and of the capital, in trust, of course, for the stockholders; but the stockholder is entitled to the profits only when the company, acting in good faith and reasonably, shall divide them; but not until then.

These earnings, then, went into the plant and were not divided. The company lawfully reserved them. When, under this act of Congress, it came to issue new stock, the stock was in no sense a dividend. Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts. But they parted with nothing in issuing



this new stock. They simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust*. She stood after the issue of the new shares just as she had stood before, and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust*.

It is hardly worth while to dwell upon any other proposition. We are of opinion that these new shares were simply representative of the interest that the trustee already had in the *corpus*. They were not, in any sense, a dividend. They came into her hands in trust just as the old shares came into her hands; and, as we have said, are, in fact, but an additional representative of a *corpus*, which, before this issue, was represented by the original shares of stock. The life legatee is entitled to receive, therefore, only the dividends declared on all of these five hundred and sixty shares. The *corpus* itself is held by the trustee for the benefit of the remainderman.

JAMES H. SPENCER

vs.

THE BALTIMORE &amp; OHIO RAILROAD COMPANY.

LAW. No. 23,620.

{ Decided June 1, 1885.

{ Justices COX, JAMES and MERRICK sitting.

The doctrine of contributory negligence applies only where the negligent act of the plaintiff is concurrent in point of time with the negligent act of the defendant so that the defendant has no opportunity to act with reference to the act of the plaintiff. It has no application to a case where the negligence of the plaintiff was prior in point of time to that of the defendant. In such a case the negligence of the plaintiff is not contributory, for the defendant's action should be controlled by the plaintiff's. whether the act of the latter was the result of carelessness or not.

## STATEMENT OF THE CASE.

This was an action brought to recover damages for personal injuries resulting to the plaintiff from the alleged wrongful and negligent act of the defendant, in suddenly and without notice starting and putting in motion one of its freight trains over which the plaintiff was attempting to cross.

On the morning of November 2d, 1881, the plaintiff, in going to the place of his employment was delayed by the blocking of the street with the defendant's train, which was standing upon the track along the street he desired to cross. He waited for fifteen or twenty minutes, expecting the train to pass on, but finding that it did not move, and being in a hurry to get to his work, he determined to cross over between the cars. Just as he made the attempt, and was in the act of crossing,, and without any notice having been given by ringing the bell or blowing the whistle, the train was started, the coupling tightened, and his foot was caught between the bumpers of two of the freight cars and badly crushed.

IRVING WILLIAMSON and CAMPBELL CARRINGTON for plaintiff:

The facts in this case bring it directly within the opinion of the court in *Grant vs. R. R. Co.*, 2 Mac Arthur, 277.

The defence is contributory negligence, and the contention is that the defendant cannot be charged unless it had actual notice of the position of the plaintiff a sufficient time before the accident to have avoided it. To this we answer that the record shows that the defendant habitually blockaded the street in question in violation of law (Act of Congress, March 2, 1831; Act of Legislative Assembly, August 23, 1871), and for a long time, to the very day of the occurrence, it knowingly permitted persons to pass over the train while it was at rest. This custom, established by the defendant, charged it with notice that persons were so passing, and made it a duty to give warning of some kind before the train was moved. The jury having found that the train was stationary when the plaintiff attempted to pass over it in pursuance of this custom, and that the injury was occasioned by the sudden movement without notice, the liability of the defendant was fixed. *R. R. Co. vs. Horst*, 3 Otto, 291; *Davies vs. Mann*, 10 M. & W., 546.

R. T. MERRICK and GEORGE E. HAMILTON for defendant:

It is contended by the plaintiff, and was held by the court below, that although the plaintiff's negligence contributed to the injury, there could, nevertheless, be a recovery if the defendant was also guilty of negligence.

It is true that in some cases there may be a recovery when both parties are guilty of negligence, but the negligent acts of the defendant which will subject him to liability, notwithstanding the contributory negligence of the plaintiff, are such as are committed after he becomes aware of the danger to which the plaintiff has exposed himself. *Swigert vs. R. R. Co.*, 75 Mo., 475.

In *R. R. Co. vs. State*, 31 Md., 366, the court says: "It is true that, in some cases, there may be negligence in both parties concerned, and yet an action may be maintained; but in such cases it must appear, either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not, by ordinary care, have avoided the consequences of the de-

fendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence."

In *Lewis vs. R. R. Co.*, 38 Md., 589, the court held that "where there is no opportunity for one party to become aware of the negligence of the other, and the injury is occasioned by the concurrent and co-operating negligence of both, it is well settled that no action will lie. In the case before us, if it be conceded there was negligence on the part of the defendant in the use of the engine at the time of the injury, it is equally clear, there was concurrent negligence on the part of the plaintiff in attempting to get on the platform of the car, and although the crossing was temporarily blocked, it cannot be imputed as negligence to the agents of the defendant, that they did not anticipate such recklessness on the part of the plaintiff. After the attempt was made to get on the cars it was impossible for the defendant to have avoided the injury by the exercise of ordinary care, because there was no interval of time during which the agents of the latter could become aware of the danger to which the plaintiff was exposed."

In *R. R. Co. vs. Johnson*, 103 Ill., 512, it was held, that "in an action to recover damages for a personal injury resulting from the alleged negligence of the defendant, the plaintiff having himself contributed to such results by the negligence on his part, by placing himself in a situation of danger, if the question arises as to the measure of care it was the duty of the defendant to have observed in case it was in his power to have avoided the consequences of the plaintiff's negligence, then, in order to charge the defendant it must be shown he had knowledge of the peril in which the plaintiff had placed himself, or the equivalent of such knowledge, at least long enough before the injury inflicted to have enabled him to form an intelligent opinion as to how the injury might be avoided and to apply the means."

In *Dunn vs. R. R. Co.* (Va.) 16 Am. & Eng. R. R. Cases, 363, it was held that "one injured by the mere negligence

of another, cannot recover compensation therefor, if he, by his own negligence or wilful wrong, contributed to produce the injury, so that but for his concurring and co-operating fault it would not have happened; except when the direct cause of the injury is the omission of the other party, after being aware of the injured party's negligence, to use a proper degree of care to avoid the consequence of such negligence."

And in *McQuilkin vs. R. R.*, 50 Cal., 7, it was held that "if the negligence of the passenger contributed directly or proximately to the injury complained of, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule, as to contributory negligence, to charge the jury that the negligence of the plaintiff, which contributed as a proximate cause to the injury, will prevent a recovery, provided the defendant has not been guilty of negligence."

For additional authority upon this point see the following cases: *R. R. Co. vs. Hall*, 72 Ill., 222; *R. R. Co. vs. Holmes*, 5 Col., 177; *Kelly vs. Hendrie*, 26 Mich., 255; *Brown vs. R. R. Co.*, 58 Me., 384; *Dickey vs. Tel. Co.*, 43 Me., 492; *Gonzales vs. R. R. Co.*, 38 N. Y., 440; *Dwyer vs. Talcott*, 16 Ill., 300.

In the case at bar it appears, from the testimony of the plaintiff himself, that his attempt to cross over the train, the starting of said train, and the infliction of the injury, were almost simultaneous in their occurrence. Between the act of the plaintiff and the movement of the train the defendant could neither have obtained knowledge of the plaintiff's peril nor have taken steps to prevent it.

It is therefore submitted that the court erred in granting its second instruction, and that its remarks in explanation thereof were inapplicable to this case and misleading to the jury.

The authority upon which the instructions of the court to the jury are based, if indeed it can be said that they are based on authority at all, is *Grant vs. R. R. Co.*, 2 Mac Arthur, 277, a case cited and much relied on at the trial below by counsel for plaintiff.

If it were necessary, that case might be distinguished in several important particulars from the case at bar, but the mere suggestion that it was decided several years before the U. S. Supreme Court had announced its opinion in the R. R. Co. *vs.* Jones, 95 U. S., 439, and R. R. Co. *vs.* Houston, cited *supra*, is deemed by counsel a sufficient commentary upon the case of Grant *vs.* The R. R. Co.

Mr. Justice JAMES delivered the opinion of the court.

It appears that the plaintiff was on the street early in the morning, during the month of September, and found lying in his path a long train of cars. After waiting a length of time for the train to move out of his way, and being impatient to reach his business, he attempted to climb over the obstruction by passing between two cars; just at that moment the train was started, without the warning having been given, by the sound of a bell or whistle, and his foot was crushed. The suit is based upon the alleged negligence of the defendant, to which the plaintiff claims not to have contributed.

At the conclusion of the trial, the defendant offered ten prayers, which were all rejected, and, thereupon the court substituted two instructions, one of which was as follows:

"If the jury believe from the evidence that the plaintiff attempted to cross the track between two of the freight cars while the train was at rest, and that while making such attempt the train was put in motion and the plaintiff was thereby injured, and shall further believe that the plaintiff was guilty of a want of ordinary care and prudence in attempting to pass between the cars while they were at rest, under the circumstances, yet if the jury shall also find that if the defendant's agents, in starting and moving the said train at the time of the injury, had used ordinary prudence and care in giving reasonable and usual signals or notice before putting the train in motion, and in keeping a reasonable lookout, the injury would not have occurred, then the plaintiff's want of care and prudence in attempting to cross between the cars (if the jury shall find the same proved),

would not in law exonerate the defendant from responsibility in this action."

It will be perceived that this instruction is applied to a case where the negligent act of the defendant and that of the plaintiff were concurrent in point of time. The same rule has been applied to similar circumstances by the Supreme Court of Missouri, and it was adhered to in a line of cases in that court. But an examination of the cases will show that the rule as declared in the Missouri decisions is not at all sustained by the general line of authorities.

Negligence consists in omitting what it was the duty of the party to do under the circumstances. For example, in the case of *Davis vs. Mann*, 10 M. & W., 548, where a person had tied a donkey so that it stood in the road, and afterwards the driver of a wagon drove carelessly along the same road so that he killed the donkey, the carelessness and negligence of the person who tied him there in the road was held not to be contributory. The negligent act of the owner of the animal was prior in time to that of the driver of the wagon. The latter saw in the road this animal, and though it had been negligently left there, he had no right, either wilfully or negligently, to drive over it. The negligence of the plaintiff in the case did not, in contemplation of law, contribute to the injury. It was what was called remote. But the reasoning of the case is, that the driver of the wagon had before him a case which called for a certain degree of care, and he should have acted with reference to the fact that the donkey was standing there. It was, therefore, negligence in him to drive as he did, in view of the circumstance.

There is a line of cases sustaining this principle, and, on the other hand, cases where the acts occur at the same time, so that the defendant has not a case before him in which he has to act with reference to the existence of negligence on the other side. In such a case the negligence of the plaintiff is contributory. Both are the effective cause of the injury that happened.

We find this rule very well stated in the case of *Trow vs.*

Vermont Central R. R. Co., 24 Vermont, 494, which I cite, not on account of its special authority, because it is one of a numerous line of cases, but because it states the principle so clearly. Having cited some authorities, the court says:

"This leads our investigation to the question whether an action can be sustained when the negligence of the plaintiff and the defendant has mutually co-operated, in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason 'that as there can be no apportionment of damages, there can be no recovery.' So where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained for the reason that the immediate cause was the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill vs. Warren*, 2 Stark, 377; 7 Met., 274; 12 Met., 415; 5 Hill, 282; 6 Hill, 592; *Williams vs. Holland*, 6 C. & P., 23. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then be well sustained, although the plaintiff is not entirely without fault. This seems to be now well settled in England and in this country. Therefore if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case if the plaintiff were guilty of negligence or even of positive wrong, in placing his horse



in the road, the defendants were bound to the reasonable exercise of care and diligence in the use of their road and management of the engine and train, and if for the want of that care the injury arose, they are liable. Such is the case of *Davis vs. Mann*, 10 M. & W., 548, where one unlawfully left his fettered donkey in the highway, and it was killed by the negligence and carelessness of the defendant in the management of his horses and wagon, Lord Abinger held, 'that he might recover, though the animal was improperly there.'"

The principle then is, that the situation presents to the defendant an occasion for a certain degree of care measured by the circumstances, one of which is that he sees that there is a person or an animal in danger, no matter whether they are there by carelessness or not, and it is his business to exercise care with reference to that situation. In such a case the fault of the plaintiff is held not to be contributory. The injury is the result of the carelessness of the defendant.

When, however, the two circumstances occur at the same time, the defendant is not charged with the duty of taking care of the plaintiff, inasmuch as the sudden occurrence of the plaintiff's act gives him no opportunity to do so. The two acts of negligence being concurrent, each is held to contribute to the result.

Applying this rule to the facts of this case, we find a person engaged in the very act of crossing this train—climbing over between the buffers—at the moment when this defendant carelessly started the train without notice.

For these reasons, and upon these principles, we feel compelled to send the case back for a new trial. There was error in this instruction.

## FRANK A. COTHARIN vs. E. G. DAVIS.

{ Decided June 8, 1885.  
 { Justices COX, JAMES and MERRICK sitting.

LAW. No. 21,313.

1. Every bill of exceptions must be complete, either by setting out the facts on which it is founded, or by referring to some other bill of exceptions which distinctly enumerates them; *affirming* Oliver vs. Cameron, MacA. & Mackey, 237.
2. It is error to exclude from the jury parol evidence tending to show that for the express purpose of concealing the magnitude of the undertaking a blank was left in the contract, and was filled up without the consent of the party sought to be charged, so as to make the contract a larger one than the latter had in contemplation at the time of signing.
3. Evidence that the paper was in blank at the time of signing is evidence tending to prove the above facts.
4. The rule which forbids a resort to parol evidence to *vary* a contract does not forbid such resort to *supply* omissions, or to supply blanks.

THE CASE is stated in the opinion.

FRED. W. JONES for plaintiff.

R. ROSS PERRY for defendant:

1. As this claim is not within the protection of negotiable instruments, the assignee takes it subject to all defences; Parsons on Contracts (5th ed.), 217.

2. The refusal of the court to permit the jury to consider in any way the evidence to show that the contract sued on was signed in blank, and that this blank was afterwards, without the knowledge, consent, or authority of the defendant, filled up with the figures 50,000, was error. That this was a material alteration of the contract, need not be discussed. That an unauthorized alteration of a contract in a material respect will avoid it, is of course settled law. Chitty on Cont., (10th Am. ed.) p. 757, note (o).; 2 Pars. Cont. (5th ed.), 716; 1 Smith's L. C. (6th Am. ed.), \*956; Bigelow on Fraud, 98, 99, 104; Lewis vs. Shepherd, 1 Mackey, 46; Angle vs. Co., 92 U. S., 330, 333, 334, 336-339, 342. (1875.)

The whole case would seem to be capable of expression in a certain number of questions:

1. Could the contract be legally signed with the blank in it?

2. If yes, could not the parties agree what figures were to limit the edition, such figures not being in the written contract?

3. If they could so agree, is it not competent, and even necessary for the integrity of the contract, that the oral testimony of these and other competent witnesses should be heard about this agreement as to the edition contemplated by this contract?

It seems to counsel that an affirmative answer must necessarily be given to each of these questions; otherwise the contract so signed in blank is either illegal—which can hardly be said—or the plaintiff had the right to fill the blank, and thus increase *ad libitum* the limit of the contract, without the knowledge and consent of the defendant, or rather *against the express agreement of both parties* as to the said limit, which is monstrous. 1 Greenleaf on Evidence, sec. 284a.; Lull *vs.* Cass, 43 N. H., 62; Keith *vs.* Kerr, 17 Ind., 284; Taylor *vs.* Galland, 3 Iowa, 17; Moss *vs.* Green, 41 Mo., 389; Webster *vs.* Hodgkins, 25 N. H., (5 Foster) 128; Miller v. Fichthorn, 31 Pa. St., 252; Winn *vs.* Chamberlin, 32 Vt., 318.

3. The defendant offered to prove by a competent witness that the signing of the contract in question, with the blank in it, had been procured by the plaintiff by means of fraudulent representations and concealments. This testimony was excluded.

It would hardly seem necessary to cite authority to establish that, when the question is of fraud, even a sealed instrument may be impeached by parol testimony. The solemn recital in a deed of a payment of money has been allowed to be disproved by parol. Again, a deed absolute in form may be shown to be a mortgage only in effect; and in both these cases the reason given is that it would be a fraud to set up even a solemn deed against the express agreement of the parties, and therefore that agreement may be proven by parol—the only way in which it can, in

the great majority of cases, be proven. *Starkie on Evidence*, 672 (marg.); *Sprigg vs. The Bank*, 14 Peters, 201; *Babcock vs. Wyman*, 19 Howard, 289, &c., &c.; *Bottomly vs. United States*, 1 Story, 135; *Van Buskirk vs. Day*, 22 Ill., 260; *Calkins vs. State*, 13 Wis., 389; *Buck vs. Appleton*, 14 Maine, 284.

Where a party has by fraud prevented the reduction of part of a contract to writing, the whole contract is open to parol proof in favor of the other contracting party. *Phyfe vs. Wardell*, 2 Edw. Ch., (N. Y., 47; *Elliot vs. Connell*, 13 Miss. (5 Smede & M.), 91; *Kennedy vs. Kennedy*, 2 Ala., 571; *Blanchard vs. Moore*, 4 J. J. Marshal, 471; *Huston vs. Noble*, 4 J. J. Marshal, 130; *Anderson vs. Bacon*, 1 A. K. Marshall, 48; *Martin vs. Lewis*, 1 A. K. Marshall, 102; *Wesley vs. Thomas*, 6 Harris & J., 435; *Chetwood vs. Brittain*, 2 N. J. Eq., (1 Green,) 438.

Mr. Justice Cox delivered the opinion of the court.

This case, which is before us for the second time, was an action brought upon the following paper:

“WASHINGTON, D. C., *May* 6, 1879.

F. A. COTHARIN: You are hereby authorized to insert my advertisement in the ‘Musical Gift,’ to occupy one-half column second page, for and in consideration of which I agree to pay to you or order, on presentation of this contract and certificate from a printer as to the number printed, at the rate of \$10 for each and every 1,000 copies of the total number printed and delivered for distribution; 500 copies to be delivered to me for free distribution. The edition not to exceed 50,000 copies. In case I do not furnish copy of advertisement for above edition within five days from above date, space may be charged for at the same rate as though copy had been furnished.

E. G. DAVIS,

*Street and No., 719 Market Space.”*

The record presents ten bills of exceptions, of which the first only is in proper condition to be considered by the

court. Not one of the others embody any testimony or even refer to any previous bills of exceptions.

In the case of Oliver against Cameron, Mac Arthur & Mackey, 237, this court recognized the rule which has prevailed in Maryland, that every bill of exceptions must be complete, either by setting out all the facts on which it is founded, or by referring to some other bill of exceptions which distinctly enumerates them. In this case none of the bills of exceptions, after the first, contain any reference to the preceding ones, or incorporate any fact upon which they are founded.

We have, therefore, only to consider the first bill of exceptions, and from that it appears that after the plaintiff had offered *prima facie* evidence to prove the handwriting of the defendant, &c., and had shown his own performance of the undertaking, the defendant, made an offer of proof which may be said to embrace two propositions. He offered first to prove that when he signed the contract there was a blank where the figures "50,000" now appear; and, secondly, to show that it was the understanding between him and the plaintiff that the blank was to be left unfilled, and that the defendant was only to pay the plaintiff ten dollars under said contract instead of five hundred dollars as claimed in this action.

This offer was refused, and it was said, in the course of the argument, that the court below felt constrained to exclude the evidence under the previous ruling of this court in reviewing the first trial of the case. It becomes, therefore, necessary to refer to the opinion which was delivered before in reference to this same case, and which is reported in 2d Mackey, 230.

It appears that at the first trial, after the defendant had himself testified to the existence of a blank in the paper when it was signed by him, he offered to show that similar papers had been presented to other parties in Washington also containing blanks, all of which were found afterwards to be filled up with the same number of "fifty thousand" copies. That evidence was admitted below, against objec-

tion. The fact offered to be proved was considered by this court *res inter alios*, and the judgment below was reversed on that ground, and that is the only question the court professed to decide in the former hearing given in the General Term. But in delivering the opinion in that case the decision on that question was prefaced by some suggestions and queries which are said to have influenced the court at the last trial in the ruling which is now complained of. I said on that occasion :

"If any wrong was done, the probability, it seems to me, is that it was in omitting the words (these large figures) 50,000 copies—for the purpose of preventing the defendant's attention from being called to the magnitude of the undertaking he was entering upon. He was thus, perhaps, lulled into some security and deterred from inspecting the instrument with the care that he ought to have exercised. Whether that folly of his is a defence or not is not a question before us, because the record limits us to the question of evidence simply."

It will be seen, therefore, that we disclaimed any discussion of the question thus suggested, and really, therefore, it had not the force of a decision which the court below was bound to follow .

Upon re-examining this question and reconsidering the question which is now presented, it seems to us very plain that if the jury should find that the plaintiff in this case left a blank in this paper and filled it up after it was signed by the defendant, for the express purpose of concealing from him the magnitude of the undertaking, he was attempting to procure from him a larger contract than the defendant had in contemplation—which would be a plain fraud—and evidence tending to establish that ought to be admitted, and evidence that the paper was in blank when signed ; and was filled up afterwards, is evidence tending to prove that condition of things.

But there is still another question. Proof was offered to show that the blank, by common understanding, was to be left blank, and that the defendant was only to pay the plain-

tiff ten dollars under the settled contract. This was objected to on the ground that it was parol evidence offered to contradict or vary a written agreement.

Here is an agreement which contains a statement "the edition not to exceed ——— copies." We consider this as having the same effect as if deliberately written out in this form, and as if the party had said he would pay ten dollars for every thousand, the edition not to exceed ——— copies, which is equivalent to saying that he would pay ten dollars for every thousand copies, to the amount of blank dollars.

Now, taking that as a written contract, it would be manifestly incomplete. There would be an omission, a blank in the contract, and the rule which forbids a resort to parol evidence to *vary* a contract does not forbid a resort to parol evidence to *supply* omissions or to supply blanks. There will be found a good collection of cases on this subject in the notes to 2 Phillips on Evidence, chap. 1, in which it appears that the courts have gone very far in allowing the introduction of parol evidence to show what they call a *supplementary* contract, particularly when the contract on its face is manifestly incomplete and even in cases where there is no appearance of such incompleteness on the face of the contract.

Now we think that this paper on its face was an incomplete written contract. It had a blank and it was competent for parties to supply that blank by parol proof, and it was therefore competent to show, outside of the paper, that it was agreed that the blank should remain there and that in fact the number of copies should be only five hundred more, so as to create a liability, in the whole, of ten dollars.

We are therefore compelled to reverse the judgment in this case, and to order a new trial.

WILLIAM SCOTT ET UX.

vs.

THE METROPOLITAN RAILROAD COMPANY.

LAW. No. 23,794.

{ Decided June 8, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

1. In a joint action by husband and wife for injuries received by the wife, recovery cannot be had for the loss of the wife's services to the husband; nor for the loss of the wife's society, nor for the expenses of her cure, nor for attendance while sick; these belong to the husband alone.
2. Hence an unqualified instruction which substantially permits the jury to give damages for injuries to the physical strength of the wife which disabled her from performing her necessary affairs and business will be erroneous, when it appears that the jury has been allowed to take into consideration testimony as to the wife's disability to pursue her business, the earnings of which, in law, belong to the husband.

THE CASE is stated in the opinion.

RIDDLE, DAVIS & PADGETT for plaintiffs.

N. WILSON for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This action is brought by the husband and wife for injuries inflicted by a servant of the defendant upon the wife. The testimony showed that while Mrs. Scott, with her young daughter, was walking on Seventh street, and was at a point between the stables and the car house of the defendant, a driver of one of the cars detached from his car a horse, struck it a violent blow and started it in a run for the stable; that the horse ran over Mrs. Scott, injuring her seriously at the time, and that in consequence of the injury she was, a few weeks afterwards, confined and delivered prematurely of a child which died soon after, and that she has been suffering from that time until the action was brought from these injuries.

On the trial she stated that her business—her own personal occupation—was that of a washerwoman, and that she was able only at times to pursue it, her expression being that she was “able to work this week, but not next.”



In view of this testimony the court, at the request of the defendant, gave the following instruction:

"The plaintiffs are not entitled to recover, in this action, anything as exemplary damages, nor as damages or compensation for the loss of the services of the wife to the husband, nor for the loss of the wife's society, nor for the expenses of her cure, nor for attendance while sick."

The defendant asked the court for another instruction, which was refused; and the court, in place of giving it, gave the following:

"If the jury shall find from the evidence that the plaintiff, Jane Scott, was injured by reason of the negligence of the defendant's agents or employees, then the plaintiffs are entitled to recover such sum as would fairly compensate for the physical and mental suffering caused by the injury during her illness, and also for whatever injury the jury may find continued after she was able to leave the house, or continued to this time, so as to diminish her physical strength or ability to perform and transact her necessary affairs and business; and if the jury believe from the evidence that the miscarriage to the plaintiff, Jane, was the natural and proximate consequence of the negligence of the defendant, that circumstance may properly form an element to be considered by the jury in awarding damages for the pain and injury suffered by the said Jane."

There is no question made, nor could there be any, of the propriety of the first instruction given by the court, namely, that the husband and wife, in a joint action, could not recover for the loss of the services of the wife to the husband, nor for the loss of her society to him, nor for the expenses of her cure, nor for attendance while sick. The loss specified is his loss alone, and the expenses referred to are obligations which he alone is liable for.

But it was claimed that in the next instruction given by the court in substitution for one that was asked, the court substantially instructed the jury that they might give damages for such injury to her physical strength as disabled her from performing her necessary affairs and business.

That describes (in view of the testimony as to what her business was, and that she was able to work only a part of the time), a class of services which she really owed to her husband.

We have endeavored carefully to see whether some other construction might not fairly be put upon it, which the jury might have properly adopted. But it seems clear that when the jury are told that they may take into consideration, in measuring the damages, the present continued diminution of strength which disabled her from performing her necessary affairs and business, that this referred to the kind of business testified to. We have the whole of the testimony upon this matter, and it refers evidently to her inability to perform the work which she said she had been doing, and the earnings of that belonged to her husband. We think, therefore, that this second instruction practically nullified what the court had already said.

It is true that the jury were told that they were not to allow, in this action damages or compensation for the loss of the services of the wife to the husband. But the jury, without an explanation, might not have known what business of the wife constitutes services to the husband, and we must presume that the general verdict was based upon all the testimony which the court permitted the jury to take into consideration, and, therefore, as testimony was allowed to go to them concerning the wife's disability to pursue her business, the earnings of which, in law, belonged to her husband, we are obliged, with some regret, to reverse the judgment of the court below.

JACOB RICH vs. CHARLES E. HENRY.

LAW. No. 23,606.

{ Decided June 15, 1885.

{ Justices COX, JAMES and MERRICK sitting.

1. It is not necessary that the return upon a *fi. fa.* should be made prior to the return day; it may be made at any time after, and even after the marshal and his deputy have gone out of office. It is not error, therefore, for the court, on a trial in which the *fi. fa.* is relied on as a defence, to permit the ex-deputy to make a return upon the writ, although it be long after the return day.
2. In cases where fraud is the foundation of the action, a larger latitude is of necessity given to questions of evidence only than in any other class of cases, for it is often impossible to say *ab ante*, what may or may not become evidence of fraud according as the future developments of the case may reflect upon it. Hence it is expedient, and often necessary, that evidence not apparently admissible shall be allowed to go to the jury, subject to the control of the court, in afterwards rejecting it or modifying with proper instructions with reference to the particular circumstances of the case.
3. An independent act or an independent declaration of an assignor after the assignment, can be of no value, of course, to prejudice an unquestionably good assignment, and *per se* is no evidence against it. But when those acts or declarations are shown to be made in connection with any privity of the assignee, and coupled with a certain scheme of procedure for the purpose of carrying it out, the court, by appropriate instructions guiding the minds of the jury in the application of these subsequent and extraneous acts, may properly submit them to the jury to reflect upon the antecedent intent.

STATEMENT OF THE CASE.

This was an action of replevin brought against Charles E. Henry, the marshal of the District, who had taken in execution certain property, consisting of merchandise of the value of about \$6,000. The plaintiff claimed the possession as assignee, under a deed of assignment for the benefit of creditors, with preferences, from one Hart L. Strasburger. The deed of assignment was valid on its face, but the defendant alleged it to be fraudulent and void and made to hinder and delay creditors, and on the trial he attacked it on that ground. For the purpose of establishing the fraud he offered, with other evidence, testimony as to certain acts and declaration of the plaintiff and his assignor subsequent to

the assignment, and in some instances subsequent to this suit. The ruling of the court in admitting this testimony formed the subject of most of the plaintiff's exceptions. The defendant, further to support his right to contest the validity of the assignment, produced certain writs of *fi. facias* issued in several actions at law in this court, which had never been returned or filed in the clerk's office, and, (it being admitted that the defendant was United States marshal when the writs issued, but that he had been out of office for more than a year then passed), the court, at the request of defendant's counsel, permitted L. P. Williams, who had been deputy marshal under the defendant, to make returns upon the writs, and to sign the returns in the name of the defendant, and then admitted the writs, and the returns so made upon them, in evidence. Upon this action of the court was based another of the plaintiff's exceptions.

The jury found for the defendant; and a motion for a new trial being overruled, the case came to the General Term upon the numerous exceptions taken at the trial, all of which, however, except that as to the admission of the writs of *fi. fa.*, embodied substantially the question involved in the exceptions first above stated.

N. H. MILLER and A. C. BRADLEY for plaintiff:

It was error to permit the ex-deputy of an ex-marshal to sign the returns upon the writs. It was the duty of the defendant to return the writ into the clerk's office within sixty days so indorsed as to show when and how he had executed it. The writs never were returned to the clerk's office as required, and the defendant could not justify under them. *Shorland vs. Govett*, 5 B. & C., 485; *May vs. Sly*, 5 Blackf., 206; *Davis vs. Bush*, 4 *Id.*, 331; *Williams vs. Bab-bitt*, 14 Gray, 141; *Russ vs. Butterfield*, 6 Cush., 242; *Mc-Elrath vs. Kinzing*, 5 Pa. St., 336; *Union Bank vs. Barnes* 10 Humph., 244.

The plaintiff had given a good bond to respond for the goods replevied, or their value, if judgment should be rendered against him, and evidence of his acts in the disposi-

tion of the goods pending the suit was inadmissible to prove fraud in the assignment. *Adder vs. Apt*, 30 Minn., 45; *Gillispie vs. Walker*, 56 Barb., 185.

The evidence admitted was more than two months subsequent to suit. The matters referred to were too remote, and did not constitute a part of the *res gestæ*, and were therefore inadmissible. *Apthorp vs. Comstock*, 2 Paige, 482-488; *Fogg vs. Child*, 13 Barb., 246; *Marbury vs. Brooks*, 7 Wheat., 578-581.

Such evidence could only be competent in aid of proof that the assignor and plaintiff combined and colluded for the purpose of hindering and delaying the creditors of Strasburger, and that the assignment was made in pursuance of such scheme. *Bump on Fraud. Conv.*, 4d ed., 585; *Marbury vs. Brooks*, 7 Wheat., 574; *Savery vs. Spalding*, 8 Iowa, 239; *Wiler vs. Manley*, 151 Ind., 171; *Beck vs. Parker*, 65 Pa. St., 262; *Adler vs. Apt*, 30 Minn., 46; *Eicks vs. Copeland*, 53 Texas, 581; *Bates vs. Ableman*, 13 Wis., 644-50; *Main vs. Lynch*, 54 Md., 658, 673; *Straus vs. Rose*, 59, 425; *Luckemeyer & Schafer vs. Seltz & Mertz*, 61 Md., 313; *Hathaway vs. Brown*, 18 Minn., 414, 427-8; *Boyd vs. Jones*, 60 Mo., 454, 470, 471; *Apthorp vs. Comstock*, 2 Paige, 488; *Cuyler vs. McCartney*, 40 N. Y., 221; *Clements vs. Moore*, 6 Wall., 299-313; *Lincoln vs. Claffin*, 7 *Id.*, 132-139.

A. B. DUVALL, HANNA & JOHNSTON and LEON TOBRINER for defendant:

The writs are not void if not returned within sixty days. There is no penalty attached to the failure to so return them. The limitation simply signifies that the defendant in such writs may compel the return after such period.

"Until the execution and return is actually filed in the proper office, the return is not complete, and is subject to the control of the officer executing the writ, and may be amended by him without permission of the court. The officer is allowed to amend his return, even after it is filed, by affixing his signature thereto, and such amendment is valid, though made after the expiration of his official term." *Herman on Executions*, 401-402.

United States Revised Statutes, section 790, authorize the late marshal and his deputies to complete the execution of process in their hands.

The law is settled for this jurisdiction that the marshal may make his return after the return day, and at the time of trial. "His return when thus made was under his oath of office, and he was equally responsible for it as if it had been made on the return day named in the writ itself." The execution, returnable on its face to November term, 1837, was actually returned at the time of trial in 1839. The court held there was no objection on this ground. *Remington vs. Linthicum*, 14 Pet., 84, 92.

And it is equally well settled, that "if an execution comes into the hands of a sheriff to be executed, and his term of office expires before he executes it, he is bound, nevertheless, to complete the execution; and the same rule applies to a marshal. An execution is never completed until the money is made and paidover to the plaintiff, if it is practicable to make it. *McFarland vs. Gwin*, 3 How., 119, 120.

To the same effect *vide*: *Welsh vs. Joy*, 13 Pick., 477, 451; *Morris vs. Trustees*, 15 Ill., 266, 269, and cases; *Wilton M'f'g Co. vs. Butler*, 34 Me., 442; *Fitch vs. Tyler*, *Id.*, 490; *Keen vs. Briggs*, 46 Me., 267, 470; *Main vs. Lynch*, 54 Md., 669.

The making of the return was not objected to, but only the offering the writs in evidence after they had been returned.

In none of the cases cited by appellant was leave asked and granted to make return of the writ; they were all cases of *trespass* against an officer in which he was compelled to justify under writs not re-turned.

As to facts subsequent to the assignment, testimony showing the ultimate destination of the property and the conduct of the parties is admissible. Such subsequent facts can only be considered by the jury as reflecting back upon the intent of the assignor when he made the assignment. Under the authorities subsequent facts are clearly admissi-

ble for the purpose. *Lines vs. McGregor*, 13 Allen, 179; *Wilson vs. Forsythe*, 24 Barbour, 121; *Shultz vs. Hoagland*, 85 N. Y., 468; *McKinley vs. McGregor*, 3 Wharton, 370, 388.

The record shows that these subsequent facts were introduced for the purpose of proving the intent of the assignor when he made the deed.

Mr. Justice MERRICK delivered the opinion of the court.

This was an action instituted by the voluntary assignee of a debtor, for the benefit of creditors, against the marshal who had taken possession of the goods under certain writs of execution. The defendant, the marshal, rested his defence upon the ground that the assignment was a fraudulent one, and the question tried before the court and jury was as to the fraudulent nature of that deed.

The exceptions in this case are multitudinous, and it is quite impossible for the court to travel over them in detail, numbering as they do, twenty-two in all, chiefly directed to points of evidence and not involving any general questions of law in themselves. Therefore, independent of other considerations, it will be useless to enter into minute criticism upon the rulings of the court upon these various points of evidence, with the exception of a single one, where the plaintiff took exception to the offer in evidence of the writ of *fi. fa.* under which the marshal justified the taking of the goods, and set up title upon the ground that it had not been returned prior to the return day.

It is a general principle of law familiar to the practice of this District and to the practice of England through an unbroken succession of decisions, that a writ of execution—final process as distinguishable from *mesne* process—does not require a return to give it vitality. It may be relied upon as an element of evidence at any time in title to land or title to personal property, independent of the fact of its having been returned prior to the return day. Indeed it is a looseness of practice not to be commended, but still it is a practice justified, that a writ of that sort does not lose any of its efficacy by not having been returned. So far do the

courts go with reference to the process of final execution, that even after the return day has passed, and long after the particular sheriff has gone out of his office, still, having life while in office, it is his duty, and the right of nobody else, to perfect that execution which he has levied; and if the succeeding sheriff undertakes, under a writ of *venditioni exponas* or otherwise, to execute that incomplete process, it is null and void, because the former sheriff is the only man who can execute the process.

That being so, the fact remains that the return may be made at any time, and when made it is of equal effect and of equal verity as if it had been made prior to the return day. The object of having a return day is that the sheriff in default may be held responsible to the parties if he is guilty of any laches; and that they may have a day in court to vindicate themselves with respect to any rights they may have respecting the process of execution.

That disposes of the question chiefly relied upon as to the title of the defendant—that the process was not returned by the return day, and, therefore, could not have been returned properly.

There were various exceptions taken to points of evidence. It may be remarked that in cases where fraud is the foundation of the action, there is a larger latitude, of necessity, given to questions of evidence only, than in any other class of cases, and that it is oftentimes impossible *a priori* (*ab ante*, as some lawyers more properly say), to determine whether a particular state of facts is or is not in the given issue of fraud. Fraud being so variant, and the act itself being equivocal, may or may not become evidence of fraud according as the future developments of the case may reflect upon it. The human motive which is at the bottom of this is so peculiar that a man may do one act from one motive and a different man do the same or some similar act from a totally different motive; and the slightest circumstances have such a kaleidoscopic action upon a set of facts, that it is impossible until they are all developed to determine what shall or shall not be the particular influence of a particular



incident upon the whole array of facts brought in view. Hence it is expedient, and oftentimes necessary, that evidence, not apparently admissible, shall be allowed to be given to the jury, subject to the control of the court, in afterwards rejecting or modifying it, with proper instruction, with reference to that particular state of circumstances.

It was that character of procedure which was resorted to, most appropriately, by the court below in the trial of this case. And in reviewing the action of the court we do not find, although the counsel were very astute in this number of exceptions to which we have alluded, that there was any error in the ruling upon the evidence at all.

The counsel relied very strongly upon the point that the allowance at the trial of evidence of acts by the assignor subsequent to the deed of assignment was erroneous. It is true that acts of the assignor subsequent to the assignment were admitted in evidence. An independent act or an independent declaration of an assignor after the assignment, can be of no value, of course, to prejudice an unquestionably good assignment, and *per se* is no evidence against it. But when those acts or declarations are shown to be made in connection with any privity of the assignee, and coupled with a certain scheme of procedure for the purpose of carrying it out, the court, by appropriate instructions guiding the mind of the jury in the application of these subsequent and extraneous acts, may properly submit them to the jury to reflect upon the antecedent intent.

That is what the court below did in this case, and it very properly, therefore, rejected one of the prayers of the plaintiff—the eighth prayer—which he presented, which was too general upon that subject, and granted his twelfth prayer which covered the entire law of that matter. The eighth prayer as rejected is in these words:

“The jury are instructed that they are not at liberty to consider evidence of matters subsequent to the execution of the assignment as against that instrument, unless they find in such evidence by the facts proven, that the assignor and plaintiff combined or colluded for the purpose of hin-

dering and delaying the creditors of Strasburger, and that the assignment was made in pursuance of such scheme."

That prayer was rejected because the language of it was too vague. But the same proposition which was probably meant to be embodied in that, was granted in the twelfth instruction, in these words:

"The evidence of the act subsequent to the execution of the assignment relied on by the defendant as evidence of fraud in the sale of goods, can only be considered by the jury as reflecting back upon the interest of the assignor when he made the assignment. The mere fact that the assignor sold the goods recklessly or below their face value would only be proof of the assignee's conduct and in itself would not tend to invalidate the deed of assignment."

That prayer was granted, and in connection with it the charge to the jury that they could only take into consideration those external and subsequent acts where they were shown from the other evidence to have been made and enacted in complicity with the assignee, and as part of the obvious scheme and combination between the two to perpetrate a fraud upon the creditors.

It is unnecessary to prolong this opinion any longer, except to say that we find, in all the exceptions that were taken, no error on the part of the judge, either in his ruling on the evidence or in the instruction and charge which he gave to the jury. Whatever might at all have some suspicion of inadmissibility was so qualified by the charge itself as to take away any possible danger of the jury being misled by what was submitted to their consideration.

The judgment of the court below is therefore affirmed.

## THE WASHINGTON MARKET COMPANY

vs.

EMMA A. BECKLEY, ADMINISTRATRIX OF THE ESTATE OF ALFRED  
JONES, DECEASED.

LAW. No. 24,150.

{ Decided July 8, 1885.

{ Justices HAGNER, JAMES and MERRICK sitting.

The fact that a claim against a deceased debtor was duly proved and passed by the Orphans' Court; and the further fact that the administrator in his account retained a sum of money with the assent of the court to pay several enumerated claims, among which was the claim of the plaintiff, and verified his administration account, are not together sufficient to remove the bar of the Statute of Limitations, when pleaded by the administrator in a suit afterwards brought by the plaintiff upon the claim.

THE CASE is stated in the opinion.

BIRNEY & BIRNEY for plaintiff.

MILLER & FORREST for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

The question for decision is fully presented by the bill of exceptions, as follows:

"On the trial of this cause, and to maintain the issue on its part joined, the plaintiff gave evidence to the jury tending to prove that one Alfred Jones died intestate in June, 1877, indebted to the plaintiff \$81 for rent of a storeroom, and that letters of administration upon the estate of said Jones were issued to defendant July 11, 1877; that on July 30, 1877, one P. S. Smith, clerk and agent of plaintiff, sent by mail to the defendant a duly proven statement of account of said debt, and demanded payment thereof, and that defendant promised to make payment within the year. And plaintiff further produced in evidence to the jury the records of the Orphans' Court of said District in the matter of the accounts of said administratrix, whereby it appeared that said defendant, on the 22d day of September, 1882, filed her first account as administratrix, and thereby charged herself with the sum of \$710.13, as proceeds of sale, &c., and

claimed credit and allowance for \$419.35 on account of payment of expenses of said administration and of debts of said estate, and, also, the further credit of \$274.40, claimed in the words following:

"By amount reserved to pay following claims:	
James M. Tenney, balance; vou. 18.....	\$129 49
W. H. Tenney & Sons, vou. 19.....	28 97
John A. Baker, vou. 20.....	15 10
Washington Market Co., vou. 21.....	\$81 00
Interest on same from Aug. 11, 1878,	
to Sept. 11, 1882, 4 years 1 mo., at 6	
per cent.....	19 84
	<hr/>
	100 84

"Which said account was verified by the oath of the defendant attached thereto. And plaintiff also gave evidence tending to prove that said account was duly passed and approved by said Orphans' Court, September 22, 1882; and, further, that the "Voucher 21" mentioned in said account, and returned therewith is the same statement of account which was delivered to said Emma A. Beckley by said P. S. Smith in July, 1877.

"And here the plaintiff rested.

"And thereupon the justice presiding, at the request of the defendant, instructed the jury that the evidence so given was insufficient to overcome the plea of the Statute of Limitations; and that their verdict must be for the defendant, to which instruction the plaintiff, by its attorneys, then and there and before the giving of the verdict, duly excepted, &c."

The plaintiff insisted that the personal representative may remove the bar of the statute by acknowledgments or promises after his appointment, and that the evidence adduced in the court below in the case at bar was sufficient for that purpose.

On the other hand the contention of the defendant was, that, however unequivocal the acknowledgment by an executor or administrator may be, or however ex-

plicit may be his promise to pay a debt of the deceased barred by the Statute of Limitations, yet neither can suffice to remove the bar of the statute if it shall be afterwards pleaded by the personal representative in a suit at law brought against him by the creditor; and he relied upon the case of *Thompson vs. Peter and Johns, Administrators, d. b. n. of Peter*, 12 Wheat., 565, as sustaining this position to its full extent. Of course if this be so, it disposes of the present case at once; as it would have ended the case in 12th Wheaton, without the necessity of examining the evidence at all.

But we do not think that decision should be so regarded.

In that case the verdict below was for the plaintiff by consent, subject to the opinion of the Circuit Court "whether the evidence which is stated in a case made by the parties *be sufficient to be left to the jury*, as evidence of a subsequent *acknowledgment* competent to take the case out of the Statute of Limitations." The Circuit Court gave judgment for the defendants, and the Supreme Court declared, "the court is of opinion that the Circuit Court decided rightly." Examining the evidence, the opinion showed plainly that the declarations of the administrator there relied on were wholly insufficient for the purpose. As this was the only inquiry then before the Supreme Court, we are authorized to consider that the expressions in the opinion were used only with reference to the question actually before it; and were not designed to apply to all possible acknowledgments or promises of a personal representative, under any circumstances whatever.

It is true the Chief Justice uses the words, "declarations against him (the personal representative) have never been held to take the promise of a testator or intestate out of the act. Indeed the contrary has been held."

This language was used in 1827. If the learned Chief Justice intended to say that such declarations *as were then under examination* had never been held sufficient to remove the bar of the statute, the observation was certainly just. But the General Court of the State of Maryland,

as far back as 1801 (in the case of *Forbes vs. Perrie's Administrator*, 1 H. & J., 109), in construing the act of 1715, ch. 23, which is our Statute of Limitations (and which was before the court in 12th Wheaton) had decided otherwise; and admitted the acknowledgment of an administrator as sufficient to remove the bar of the statute.

A number of other cases may be referred to, decided before 1827, where the efficacy of an acknowledgment or promise of the personal representative had been recognized. Among others is *Tulloch vs. Dunn* and another, executors of Hanley (1 Ryan & Moody, 416), decided in 1826. There both the defendants had, within the six years, acknowledged the plaintiff's demand to be due; but one of them had expressly promised that it should be paid. Chief Justice Abbott admitted that an express promise by both the executors would remove the bar of the statute and entitle the plaintiff to recover, but held that a mere acknowledgment by both, or a promise by one only, would not be sufficient.

So in *Johnson, Administrator, vs. Beardsley et al.*, 15 Johns., 3, decided in 1818. Within six years before suit was brought, two of the defendants, who were also executors of the original debtor, admitted the demand and promised to pay the debt. The court said the acknowledgment of one joint debtor of the existence of the debt is sufficient to take the case out of the statute, and added: "The court see no reason why that principle should not apply to the case of executors, heirs and devisees as well as to every other case."

Undoubtedly it had never been held that such light and careless declarations as were relied on to remove the bar in the case in 12th Wheaton, were adequate; and the decision agreed entirely with the rulings of the Court of Appeals of Virginia in several cases many years before 1827, where similar declarations were held insufficient (*Henderson vs. Foote*, 3 Call, 251; *Lewis vs. Bacon*, 3 Hen. & Munf., 105; *Epes vs. Dudley*, 5 Rand, 437); though in those cases it seemed to be plainly admitted that there might be declarations by an executor which would be adequate.

There has been no decision since that time by the Supreme Court upon the precise point, except the case of *Johnson vs. Waters*, 111 U. S., 640, where it was held that the executor or administrator of an estate can by acknowledgment suspend the prescription of the statute; but the ruling was based upon the Louisiana law and is entitled to no wider application.

The decisions in the different States upon the general question seem to be quite at variance. In Maryland where our statute originated, the distinct acknowledgment or promise by the executor or administrator has always been held sufficient. Such have been the rulings in Maine, New York, Virginia, Kentucky, New Hampshire, New Jersey and Massachusetts. In several of those States an acknowledgment without an explicit promise has been admitted for the purpose. In Pennsylvania, Connecticut, Mississippi, Texas and Indiana it seems to have been held otherwise. Angell, in his treatise, assembles the authorities, § 261 *et seq.*, but expresses no decided opinion on the subject; while Wood, in his recent treatise, inclines to the opinion that the weight of the decisions is adverse to the power of the administrator to remove the bar of the statute by acknowledgment or promise.

The question now before us, however, is as to *the sufficiency of the evidence in the bill of exceptions* to remove the bar of the statute, and that involves the inquiry as to the legal effect of the proving and passing of the plaintiff's claim by the Orphans' Court, and of the retention by the administrator, on settlement of his administration account in 1882, of a sum of money to pay the plaintiff's claim with interest to that date, in accordance with the provisions of the act of 1798, ch. 101, of Maryland, which forms almost the entire testamentary system in force in this District.

We are spared the necessity of stating at length in our own words the opinion of the court upon these items of evidence, by our adoption here of the language of the Court of Appeals of Maryland in the case of *George W. Pole vs. James T. Simmons and Charles S. Simmons*, ad-

ministrator of Richard E. Simmons, 49 Md., 14, where these identical questions, with others, were fully examined. In that case the court was construing the provisions of the same Statute of Limitations, as well as the same testamentary statute, that are in force in this jurisdiction.

The facts were as follows: On the 20th of August, 1875, Pole declared, in the common counts, against the administrators of Simmons, for money payable by their intestate in his lifetime. The defendants pleaded that the decedent never promised, never was indebted as alleged, and *actio non accrevit infra tres annos*.

The plaintiff's bill of particulars set forth an open account alleged to have been due by the deceased, running from September, 1856, to February 17, 1872; to which was attached a certificate of probate sworn to before the Register of Wills on the 23d of March, 1871, and endorsed: "By the Orphans Court. Will pass when paid. Test: S. G. Cockey, Register."

At the trial the plaintiff, to remove the bar of the Statute of Limitations, offered sundry items of evidence which were severally ruled out by the court below, and the question before the appellate court was whether these rulings were correct.

The specific items were as follows:

1st. He offered the second administration account passed by Charles S. Simmons one of the administrators, containing, among other allowances claimed by him, one to this effect: "No. 30. For this sum retained to pay George W. Pole, his account proved and passed, as per docket appears, \$165.77."

2d. He proposed to prove by the Register of Wills that the account set forth in the bill of particulars was proved and passed, according to the endorsement thereon in the handwriting of the witness.

3d. That the claim of the plaintiff against the estate of the deceased was entered upon the claims docket, one of the records of the Orphans' Court.

4th. A conversation between the plaintiff and the de-



fendant Charles S., on the 17th of February, 1872, with reference to this claim.

5th. That the account sued on was the only claim of the plaintiff proved and passed by the Orphans' Court; and that there was no order of that court directing or authorizing the defendants to retain any part of the estate of the deceased to meet the existing suit.

6th. He offered to read a letter to the plaintiff from Charles S., the defendant, dated March 6, 1872, commencing, "Enclosed find your account, and check for \$163.15;" and concluding, "Receipt the account and send it by mail as we must have it to file;" and also a check of the same date for \$163.15, payable to George W. Pole, or order, "in full of accounts and claims against the estate of R. E. Simmons." Signed, "Jas. T. and C. T. Simmons, adm'rs of R. E. Simmons." This check was drawn for about two dollars less than the amount claimed by the plaintiff in his account, and seems to have been refused for this reason.

7th. He also offered to prove a conversation between the defendant Charles S. and the judges of the Orphans' Court, in which the judges informed him that he must pay the plaintiff's claim before he could settle the second administration account with the Orphans' Court; that this conversation took place while the witness was making up the second administration account, and that he preceeded to complete it immediatety afterwards; and that the second and third (being the final) accounts of the administrator were passed by the court; the second account which contained the item of \$165.77 retained to pay plaintiff's claim, was verified by the affidavit of Charles S., "that the foregoing account is just and true, and that he has paid, or secured to be paid, the several sums for which he claims an allowance."

The appellate court first considered the provisions of sec. 13, sub. ch. 9, of the Testamentary Act of 1798, ch. 101, which empowers an administrator "to reject and dispute any claim exhibited with the vouchers and proofs, in case he shall have reason to believe the deceased never owed or had dis-

charged the debt or had a claim in bar;" and adopted the case of Miller, Adm'r, *vs.* Dorsey, 9 Md., 317, as affording a correct construction of that section. There an administrator had paid a dividend to a creditor on his claim. Subsequently, and more than three years after this payment, an administrator *d. b. n.*, who had received further assets, refused to recognize the residue of the claim, and interposed the plea of the Statute of Limitations when sued. Upon appeal it was held that if the administrator *d. b. n.* had no other rights than those belonging to the original administrator, "it did not preclude him from objecting to any claim which may be presented against the estate. The payment of a dividend by the original administrator did not preclude him, on the ascertainment of grounds of objection to claims once acknowledged by him, from urging that objection in a court of law. It cannot be pretended that if an administrator should, after acknowledging a claim against the estate of his intestate, discover that it had been paid, he would be debarred from setting up such fact to defeat the claim, and if this be so, why not the administrator *d. b. n.*? In either case the administrator is, in the first instance, the only judge whether the claim shall be paid or not. To his discretion and conscience alone is confided the propriety and justice of the plea of limitations; with this the Orphans' Court has nothing to do."

The appellate court then proceeded to comment upon sec. 10, sub. ch. 8, of the act of 1798, as follows: "The provision of the testamentary law, authorizing the administrator *to retain money* to meet a claim known to him 'provided he can satisfy the court that such claim is just or may probably be recovered,' is intended to promote dispatch in the settlement of decedent's estates by setting apart a fund to meet outstanding claims, without delaying distributees or postponing the final account until all claims are paid. The entry of such a retainer does not imply an acknowledgment that anything is due, nor, as we have seen, deprive the administrator of the right to contest in courts of law, every such claim, by whatever legal defence he thinks proper to resort to."

"An administrator may undoubtedly, by his promise or acknowledgment, revive a debt due by his intestate (*vide* *Forbes vs. Perrie's Adm'r*, 1 H. & J., 109; *Chapman vs. Dixon's Adm'r*, 4 H. & J., 527; *Quynn vs. Carroll's Adm'r*, 10 Md., 197); but the act of retainer, evinced by the record, legally imports neither promise, admission nor acknowledgment, express or implied."

And the conclusion of the court upon the question of the admissibility and sufficiency of the evidence offered is that "these items of evidence, taken separately or collectively, were not sufficient, in our opinion, to remove the bar of limitations."

It is apparent that the testimony offered in the case in 49th Maryland to remove the bar of the statute, was much stronger than that set forth in the statement now under examination; and adopting the reasoning and conclusions of the Court of Appeals in that case, we consider it unnecessary to say anything further in support of the decision below; which is affirmed.

## CATHERINE DIGGINS vs. BRIDGET DOHERTY.

EQUITY. No. 8,839.

{ Decided July 8, 1885.

{ Justices HAGNER, JAMES and MERRICK sitting.

1. It is entirely competent to show a consideration different from that expressed in the deed when it is of the same general character. Thus, when the consideration stated is money, which is a valuable consideration, the consideration of having a home in the property conveyed, being of the same character, may be shown by parol testimony to have been the true consideration.
2. When the consideration is that the grantee shall provide a home for the grantor in the property conveyed, and the grantee afterwards refuses to provide such home, a court of equity will rescind the contract on the application of the grantor and return the parties to their original *status*.

## STATEMENT OF THE CASE.

Bill in equity to set aside a deed.

The bill sets forth that Dennis Blaney died intestate, and seized and possessed of certain real estate, and leaving surviving him his widow, Johanna, and his two sisters, one of whom is the plaintiff, and the other the defendant, Bridget Doherty, his only heirs-at-law; that the said Johanna (in pursuance of an agreement among the parties interested for the settlement of the decedent's estate), joined with plaintiff in the execution of a deed conveying all her right, title and interest in the said real estate to her sister, Bridget Doherty, the defendant; that the real and only consideration for executing said deed was that she should have a home and reside with her said sister Bridget upon said premises during her life; that she is over seventy years of age, and that her sister Bridget and her husband have driven her out of said premises; that they have refused, and still refuse to permit her to reside with them, and that she has been compelled to seek a home with her step-daughter.

The bill then prays that this deed may be set aside and declared void so far as it conveys plaintiff's interest, and that the property may be sold and the proceeds divided between the parties in interest.

The defendants, Bridget Doherty and Joseph, her hus-

band, filed a joint and several answer. They denied that the consideration of the deed was as stated in the bill, but alleged that the deed was executed pursuant to an amicable partition of Blaney's estate; that the estate consisted of over \$3,000 in money and two houses; that the widow was to have \$1,600 of the money, and the two sisters \$1,000 each, and that the defendant Bridget should have the least valuable of the two houses; that at this time the plaintiff was living at the National Hotel, and only came occasionally to the house; that in consequence of the plaintiff's intemperate habit they were compelled to tell her that she must either keep sober or cease to visit them; that while they deny any legal obligation to do so, yet they are ready and willing to receive the plaintiff and care for her during the rest of her life if she will leave off her intemperate habits.

A replication was filed to the answer, and testimony was taken.

On the hearing in Special Term the court dismissed the bill, and plaintiff appealed.

BAINBRIDGE H. WEBB for plaintiff:

All the recent decisions hold that parol evidence is admissible to show the real consideration of a deed as being different from that stated. They explain that the deed is the execution of the contract, but not the contract itself, and that its object is to transfer the title to the purchaser and not to state the terms on which he bought. 1 Md. Ch., 392; *McCrea vs. Purmort*, 16 Wend., 490; 26 Conn., 368; 14 Johns, 210; 20 *Id.*, 338; *Adams vs. Hull*, 2 Denio, 306; 3 Am. Dec., 306; *Williamson vs. Scott*, 17 Mass., 249; *Goodspeed vs. Fuller*, 46 Me., 141; 11 Ohio St., 339; *Rockhill vs. Spraggs*, 9 Ind., 30; *Vail vs. McMillan*, 17 Ohio St., 617.

Nathan Vail conveyed his real estate to James McMillan, his wife's illegitimate son, reserving a life estate to himself and wife. The consideration mentioned in the deed was \$350. The grantee died, and his widow (and heir-at-law under the laws of Ohio) filed a bill to restrain Vail from

committing waste. Vail filed a cross-bill to set aside the conveyance for failure of consideration, alleging that no money had been paid, but that the sole consideration of the deed was that McMillan should support Vail and wife during their lives. The court said: "The question then is, did the district court err in ruling out and declining to consider the evidence tending to show by parol testimony that the verbal contract of McMillan for the support of the old people during their respective lives, was in fact a part consideration for the execution by them of the deed in question. We are constrained to think that it did. Vail *vs.* McMillan, 17 Ohio St., 617.

In Clifford *vs.* Terrill, 9 Jurist, pt. 1, 622, the chancellor said: "It was said that the plaintiff could not go out of the deed to prove that there was any other consideration. Now the settled rule of law is that you may do so."

There can be no doubt of the power of a court of equity to grant the relief prayed for by this bill.

The power is exercised under that head of its jurisdiction where rescision, cancellation or delivery up of agreements, securities or deeds is sought, or a specific performance is required of the terms of such agreements, securities or deeds as indispensable to reciprocal justice. The application to a court of equity for either of these purposes is not strictly a matter of absolute right, upon which the court is bound to pass a final decree. But is a matter of sound discretion, to be exercised by the court either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case. Story's Eq. Jurisp., §§ 692, 693.

William Bogie conveyed to his son John absolutely, who by separate instrument agreed to support his father, the grantor, during life, and to make certain payments. The bill prayed, among other things, for a rescision of the conveyance for failure to support, which the court granted, saying, a portion of the relief sought is the rescision of the conveyance and agreement, and a court of equity has power in proper cases to grant such relief. On the question as to

what relief should be granted for the entire failure of John Bogie to perform his agreement, we have no doubt or difficulty whatever. The proper relief, to wit, the rescission of the conveyance and agreement is prayed in the complaint. We should not hesitate so to hold on principle in the absence of adjudged cases. *Bogie vs. Bogie*, 41 Wis., 209.

And see *Bresnahan vs. Bresnahan*, 46 Wis., 385. See, also, *Tracy vs. Sacket*, 1 Ohio St., 54; *Dunn vs. Chambers*, 4 Barb., 376; *Devereux vs. Cooper*, 11 Vt., 103.

But besides the innate equity of the particular case presented to the court, it is submitted, that it has other features which courts of equity have always regarded as good grounds for the exercise of that power which is now invoked. Here is the case of an aged woman who conveys her property to a younger sister, upon the promise of that sister to give her a support during the rest of her life. It may readily be gathered from the testimony that the grantor, by reason of her age and illiteracy was incapable of viewing the transaction in its legal or business light, but was induced to execute the deed solely by the sister's promise of support.

In *Huguen vs. Basely*, *White & Tudor's Leading Cases in Equity*, vol. 2, pt. 2, p. 1174 *et seq.*, the court, in speaking of the relief granted in voluntary conveyances, says that they stand upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another.

In *Harvey vs. Mount*, 8 Beav., 439, a younger sister conveyed to the intended husband of an elder sister in trust for her (the grantor) during her life, and after death to stand as trustee for the other sister absolutely. The deed was set aside, the court observing upon the relationship of the parties, and that dominion may have been exercised by this one sister over the other. *Sharp vs. Leach*, 31 Beav., 491; *Billage vs. Souther*, 9 Hare, 534; *Dunn vs. Chambers*, 4 Barb., 376.

HINE & THOMAS for defendant:

This is a bill for rescission and cancellation of a deed on the

ground of failure of consideration; there is no fraud or illegality alleged in procuring the conveyance complained of, nor is it stated that it was obtained by mistake of facts material to its operation; it is, therefore, respectfully submitted that the jurisdiction to rescind does not arise. The remedy of the plaintiff is at law, and this was the view taken by the court below in dismissing the bill.

Again, had the plaintiff even stated such a case as would entitle her to the relief prayed, the court would not exercise the jurisdiction invoked, because the proofs show the parties could not be placed in *statu quo*; in addition to this, there is a serious conflict in the testimony, and the court at special term might very well have dismissed the bill, because the plaintiff failed to establish her case.

The conveyance in controversy is absolute on its face; the proposition is not to show that the real transaction was a loan, and the conveyance a mortgage, or such facts as would create a resulting trust in favor of the plaintiff, but that the consideration failed—or what is even worse—that the consideration was that the grantee would support the grantor for life—to vary the terms of the deed by showing that the consideration was different from that expressed—and this too by parol. It is sufficient, we think, to say it cannot be done.

The plaintiff when she executed and delivered the deed, which she now wishes to rescind, had the benefit of counsel; such objections then as age, illiteracy, &c., should have no influence in the decision of the case.

The rule that parol testimony will only be received either to establish an equity of redemption, or a resulting trust, is too well established, we think, to require a reference to adjudged cases.

The cases cited in appellant's brief are of the class where a bond or agreement in writing explaining the nature of the transaction is executed contemporaneous with the conveyance; they are not relevant to this case and should not be followed as authority.



Mr. Justice JAMES delivered the opinion of the court.

The proofs show that one Dennis Blaney died intestate in 1881, seized of certain property, and leaving a widow and two sisters. By an amicable arrangement provision was made for the widow, and the sisters, the plaintiff and defendant, took the house and lot to which this suit relates. The plaintiff thereupon conveyed her undivided half interest to the defendant. A money consideration is named in the deed, but it is shown that a parol contract was made as a part of the transaction, that, in consideration of this conveyance, the grantee was to provide the grantor a home in that house during the remainder of her life. The grantor was then an old woman of seventy years.

It was competent to show a valuable consideration different from the valuable consideration named in the deed. As the latter was not paid, nor intended to be paid, and the true consideration has been withheld, the question here is, to what relief the plaintiff is entitled.

Where money or other property is the true consideration, the remedy at law is adequate, and there is no room for the interference of equity. The damage arising from non-performance is perfectly ascertainable and measurable in money. But where the contract is intended to operate continuously, as a provision for the future of the grantor, by actual specific performance, the remedy by damages is not adequate. The money which would secure for the grantor a home in some other house and among strangers is not, even if a jury could ascertain it, a compensation for the loss of the particular home which the grantor intended to secure. Moreover, a jury cannot ascertain the actual amount of money which will secure a house for the remainder of a life. Tables of longevity are not applicable for any such purpose. In addition to the inadequacy of the remedy at law, there is another distinct ground for equitable relief. To refuse performance of this continuous contract and at the same time to retain the subject granted in consideration of such performance, is fraud. The proper

relief in that case is rescission of the contract itself. It is hardly necessary to refer to authority for the exercise of such jurisdiction; the doctrine is familiar. This conveyance is annulled.

BENJAMIN U. KEYSER

vs.

JOHN HITZ ET AL.

EQUITY. No. 6563.

{ Decided July 8, 1885.  
{ Justices HAGNER, JAMES and MERRICK sitting.

Where there is a mortgage or deed of trust upon property, the mortgagee or *cestui que trust* may, in a proper case, have the aid of a court of equity to take possession, through its receiver, of the rents and profits; and when this is done and the property pledged is sold, the rents and profits, as well as the *corpus* of the fund, go to satisfy the claim of the creditor. But where a receivership is not asked for, and the rents and profits of the mortgaged property are permitted to pass into the hands of the mortgagor, the mortgagee can never recover them back, even though there be a deficiency in the amount of the proceeds of the sale, the reason being that it was the mortgagee's fault in not having a receiver appointed. In this respect a mortgage and a deed of trust stand precisely upon the same footing.

## STATEMENT OF THE CASE.

The bill in this case was originally filed by B. U. Keyser, as receiver of the German American National Bank, to set aside a certain deed of trust in favor of W. P. Jenks, which was alleged to have been fraudulently made and in derogation of rights of the bank of which complainant was, at its failure, appointed receiver. The decree at Special Term sustained the deed of trust in so far as it affected the life estate, or other interest, of the defendant John Hitz in the property in question, but avoided it in so far as it affected the interest of his wife in such property; and provided for the appointment of a receiver to collect the rents, &c., and apply them to the liquidation of Mr. Jenks' claim under the encumbrance in his favor. Keyser was in possession of the property under certain conveyances and assignments from John Hitz and one Sarah Crane, pending the litigation, and by virtue of such possession had collected a considerable sum. From the decree in Special Term he appealed to the General Term, and obtained an order modifying that portion of the decree which appointed a receiver,

so as to permit him to remain in possession and continue the collection of the rents and bring the money into court. In deciding the appeal from the Special Term (see 2 Mackey, 513) the General Term reserved the question of the disposition of these sums collected by Keyser; and this hearing was upon exceptions to the auditor's report as to the disposal of this fund.

LEIGH ROBINSON, for Keyser, contended that, by virtue of the assignment from John Hitz, as well as by the fact that Hitz was a large judgment debtor of the bank, he was entitled to retain the fund.

W. D. DAVIDGE and R. D. Mussey, in behalf of Jenks, contended that though there might be some doubt, in view of recent decisions, as to the right of Jenks to insist that all the money collected by Keyser, during his entire term of possession, should be applied to the extinguishment of the taxes and for insurance, &c., on the property, there could be no question that all the money which he had collected after the decree in Special Term, and which he had paid into the registry of the court should be applied: 1st, to the taxes (of which none have been paid by Keyser during his holding); and, 2d, to the reduction of the debt due to Jenks; that his possession since the decree in Special Term had been in effect the holding of the court, by a receiver for the benefit and protection of the *cestui que trust*, such as is contemplated in the opinion in *Kountze vs. Hotel Co.*, 107 U. S., 395.

ENOCH TOTTEN for Mrs. Hitz:

The case of *Shepherd vs. F. S. & Trust Co. et al.*, Equity, No. 5723, decided by the General Term, December 1, 1884,\* governs this case. One branch of that controversy involved the precise question presented in the present application, so far as it relates to the fund of about \$3,000 in the hands of the receiver in this case. In that case there was a receiver

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\*Never reported.

appointed on the application of the mortgagee, based on the allegation that the property was inadequate security for the payment of the debt, and that the debtors themselves were insolvent. This receiver collected out of the mortgaged property, and had in hand about \$800.00 for distribution. The Court held that this sum belonged and should go to the mortgagor, and not to the mortgagee, and decreed accordingly.

Counsel also cited and relied upon *Kountz vs. Omaha Hotel Co.*, 107 U. S., 378; *Teal vs. Walker*, 111 U. S., 242.

Mr. Justice MERRICK delivered the opinion of the court.

The case of *Keyser vs. Hitz* comes before us upon exceptions to the report of the auditor in the distribution of the funds which had been received by Keyser, one of the parties to the suit, under an order of the court appointing a receiver during the progress of the litigation. The property in question was covered by a deed of trust, and amongst the divers claims which were presented against the property was the claim of W. P. Jenks, who was secured by a deed of trust upon the property, and after the litigation had progressed some time he was authorized by the court to sell the property at private sale under the deed of trust.

The contest here now is upon the distribution of the rents and profits which remained in the hands of the receiver, as between him on the one part, Mrs. Hitz, the claimant of the property, on the other part, and Keyser himself as receiver for the benefit of the bank, he claiming that he held certain judgments on the part of the bank against Hitz, to the liquidation of which he was authorized to appropriate the proceeds of the rents and profits by a convention between him and Hitz himself.

A careful examination of the authorities shows conclusively, the authorities all concurring in this, that where there has been a mortgage or deed of trust upon property, until some action is taken on behalf of the trustee and *cestui que trust* or the mortgagee to obtain possession of the property, or to assert their right to the possession, the

rents and profits belong to the mortgagor, and if they are permitted to pass into the hands of the mortgagor they cannot be recovered back by the mortgagee, even though there be a deficiency in the amount of the proceeds of sale.

For the purposes of a case of that sort a deed of trust and a mortgage stand precisely upon the same footing as it will be found by reference to a case in 48th Mississippi, which I do not happen to have before me at this moment so as to be able to refer it. In the delivery of that opinion the court shows that a deed of trust is, to all intents and purposes, just like a mortgage, with this difference: That the mortgagee, by the terms of the mortgage, is himself entitled to enter upon the property and take possession, but that the trustee, being only authorized to seize and sell, is not empowered to take possession, of himself, of the property so as to dedicate the rents and profits to the gratification of the lien, when there is a deficiency of the property, whenever it was to gratify the lien, either of the deed of trust or of the mortgage, as the case may be. Either the mortgagee or the trustee and *cestui que trust*, where the predicament is suitable to such an occasion, can have the benefit of the arm of a court of equity to take possession, through its receiver, of the rents and profits; and when thus taken possession of, and the property pledged is sold, the rents and profits, as well as the *corpus* of the fund, go to satisfy the claim of the creditor.

In this particular case it seems that early in this litigation there was a receivership of the property appointed by this court as far back as the year 1880 or thereabouts, Keyser became receiver, then somebody else became receiver, and then Keyser was substituted by an agreement between themselves and by the action of the court, in place of the other receiver, so that he was practically the receiver of the property for the whole term of the receivership.

As I say, it appears by all the authorities that wherever the mortgagee takes possession himself, from that time forth he is entitled to the rents and profits to be added to the proceeds of sale if it be necessary to gratify the claim. And where there is a deed of trust or mortgage, and the mort-

gagee, instead of taking possession himself, invokes the aid of a court of chancery for the purpose of having a receiver appointed, in that case also, whether there be a deed of trust or a mortgage, the proceeds of the rents and profits are consecrated by the court of chancery to the satisfaction of the debt in aid of the proceeds of sale. For, from the very moment of forfeiture, a mortgagor or grantor, in a deed of trust, certainly has no equitable claim to the fund. He has dedicated the property to the payment of the debt, and along with the dedication of the property, goes, as a matter of course, after default, properly and rightfully the dedication of the rents and profits. Why the *certui que trust* or mortgagee cannot recover back rents and profits when received by the mortgagee is manifest. It is in perfect analogy to the common principle that where a party has voluntarily allowed his fund to pass into the hands of another party he cannot invoke the aid of a court to get it back.

All this is thoroughly maintained and supported by the Supreme Court of the United States itself in the very case which is relied upon by the counsel who was contending against the claim to the rents and profits on behalf of the parties secured by the deed of trust in this case—the case of *Kountze vs. The Omaha Hotel Company*, reported in 107th U. S. R., 378. There the opinion of the majority of the court was delivered by Mr. Justice Bradley, and he carries to the very extreme of the law the doctrine that the mortgagee out of possession is not entitled to the rents and profits. And I find, by pursuing the authorities, that he carries it there in deference to the opinions of the courts of his own State of New Jersey, which carry the doctrine further than the courts of any other State in this Union. Through that influence the Supreme Court of the United States was led to carry the doctrine to its extremity, for they held that the mortgagee was not entitled to the rents and profits which accrued pending a foreclosure suit on his part, and although the decree of foreclosure had been granted to him in the court below and there had been an appeal, still he was not entitled to the rents and profits after that.

Why? Mr. Justice Bradley justifies the doctrine upon this ground, because, he says, that he might have applied for a receivership, and if there had been a receiver appointed, then the rents and profits collected by the receiver would, in his hands, have gone to make up the deficiency of the *corpus* of the mortgaged property in satisfaction of the mortgage debt for which it was placed. I read from page 393 of the opinion referred to as follows:

"The plaintiff in this case was not entitled to the possession nor to the rents or profits; the foreclosure suit did not seek possession, but sought a sale of the specific thing—the land. On such a case until the litigation is ended, it does not appear that there must be a sale, or even that the plaintiff is entitled to a sale."

Then he goes on and at page 395 he says:

"There is another consideration which relieves the conclusion we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power when the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and this is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting timber, suffering dilapidation, &c., &c., to take charge of the property by means of a *receiver*, and preserve not only the *corpus*, but the rents and profits for the satisfaction of the debt. Where justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection."

That same doctrine is laid down in *Jones on Mortgages* and in *High on Receivers*, throughout, and it is the concurrent testimony of all the courts of the United States, without any contradiction or qualification, that wherever, in a particular case, a receivership has been appointed, and the *corpus* fails to gratify the lien of the mortgage or the deed of trust, it will be supplemented by the rents and profits which have been collected by the receiver upon proper application to the court.

That being the principle, it disposes conclusively of this



case, and the decree of the court, therefore, will be that the case be remanded to the auditor for the purpose of allowing to the holder of the deed of trust, Jenks, all the rents and profits which were received after the receiver was appointed by this court (all the rents and profits which were received from any other source will be allowed to be paid over to Keyser under his claim as made in this case), but all that were received by him, under the authority of the court after the receivership was established by the court, will be dedicated, first, to the payment of the arrears of taxes, as stated by the auditor, both the past taxes, the current taxes and the taxes in arrears, and whatever is left after paying those taxes will go to the payment of the balance of the debt secured by the deed of trust.

The case then will be referred back to the auditor with instructions, which the counsel will draw up, overruling all the objections made on the part of Mrs. Hitz, overruling her objections to the auditor's report, denying that she has any claim under the circumstances, overruling the objections of Keyser in so far as they claim any part of the rents and profits which were received under the receivership of this court, and sustaining the objections made on the part of Jenks, the holder of the deed of trust.

## OLIVER M. ATWOOD vs. TALTON LATNEY ET AL.

LAW. No. 25,982.

{ Decided July 8, 1885.  
{ Justices HAGNER, JAMES and MERRICK sitting.

Where the undertaking in an appeal bond is absolute, there is no necessity in declaring on the bond for failure to prosecute the appeal with effect, to aver that any request or demand was made upon the defendants to pay the damages and costs, and a demurrer upon that ground is frivolous.

THE CASE is stated in the opinion.

JAMES W. GREER, E. B. HAY and SAMUEL MADDOX for plaintiff.

FRANK T. BROWNING for defendants.

Mr. Justice JAMES delivered the opinion of the court.

This is a suit upon an appeal bond given by the defendants, Latney, Burns and Kilmartin, in the case of an appeal from a judgment of a justice of the peace in a landlord and tenant case. The declaration sets forth that the defendants, by their certain writing obligatory, sealed, &c., acknowledge themselves to be jointly and severally bound to the plaintiff in the sum of \$150, conditioned that if the appellant shall prosecute his appeal in this court, and shall pay the said Atwood all intervening damages resulting from waste, and all intervening rents for the premises and costs, in case he shall fail to prosecute his appeal with effect, then the bond shall be discharged.

The declaration then asserts that the appeal was not prosecuted with effect, and that the defendants "did not nor ever would pay the damages and costs." To that declaration the defendants demurred, on the ground that there was no averment of any request or demand made upon the defendants, or either of them, for the payment of the intervening rents, damages and costs. In the court below, the demurrer was held to be frivolous, and, therefore, judgment was rendered for the amount claimed—sixty-two dollars and costs. Whereupon the defendants appealed.

There seems to be a curious want of direct authorities upon this question, but we have looked at it upon principle and we think it is perfectly clear, and there was no room for discussion about it. This was an absolute obligation. The authorities cited applied to cases of guarantee where the object was to fix the liability of the parties, it being collateral, and conditional upon certain other things which were to happen. Here the liability of the surety is absolute, and, although the bond runs in the language of ordinary bonds, it is an undertaking that the principal shall prosecute the appeal with effect, or pay, and the undertaking of the surety is that that shall be done. In all absolute undertakings it is settled that it is entirely unnecessary to allege a demand upon the defendant himself or upon the surety before you can bring an action, so that there was no necessity for a demand in order to fix the liability of the surety; his undertaking was absolute. There is in principle no room for doubt about this, and we hold, therefore, that the demurrer was frivolous. The judgment is affirmed.

## DENNIS QUILL vs. JOHN G. WOLFE.

EQUITY. No. 8,858.

{ Decided July 8, 1885.  
{ Justices HAGNER, JAMES and MERRICK sitting.

Where a court of equity is asked to set aside a deed on the ground of fraud, and the answer denies all fraud and avers a valuable consideration to have been paid for the property, and in addition the witnesses relied upon by the complainant also deny the alleged fraud, the bill will be dismissed, although there be many circumstances of suspicion surrounding the transaction, for fraud must be proved; the court cannot, in the face of the rule that fraud is odious and not to be presumed, supply the deficiency of proof by presumption.

## STATEMENT OF THE CASE.

Dennis Looney was largely indebted to the complainant, Dennis Quill, which indebtedness was secured by deed of trust on part of the real estate of Dennis Looney. Quill undertook to foreclose the deed, and a long litigation ensued, beginning in February, 1882, and ending in 1884. The result of the controversy was a decree for the sale of the land covered by the deed of trust, and the proceeds not satisfying the debt due Quill, there was a decree against Looney for the principal sum of \$981.34.

At this time Dennis Looney owned two other lots of land besides that in controversy, and, pending that suit, he conveyed them to one Herlihy, a cousin of his, Looney's, wife. About a year afterwards Herlihy conveyed these two lots to the defendant John G. Wolfe, the son-in-law of Looney. At the time this conveyance was made, and for a number of years previous thereto, Wolfe had resided with and was one of the family of Looney. This bill was filed to subject one of those lots conveyed to Wolfe to the satisfaction of the debt due Quill; the bill allèged that no consideration was ever paid therefor either by Herlihy to Looney or by Wolfe to Herlihy, and that Looney had by this means conveyed his property with the intent to defraud his creditors, and especially Quill.

A decree *pro confesso* was taken against Herlihy. The other defendants put in answers denying all fraud. Testimony was taken by the complainant, but the defendants took none.

On the hearing in Special Term the court decreed in favor of the complainant, from which decree the defendant Wolfe appealed.

R. B. LEWIS for complainant:

The evidence abundantly shows that this conveyance was made to hide the property from the pursuit of Looney's creditors and principally from Quill.

The proofs are full—as full as it is possible to get in a case where a fraudulent disposition of property is made.

Men about to commit fraud do not proclaim their intentions openly, but the acts they do are done quietly, and frequently with every appearance of fairness on their face.

The law, however, knowing the difficulties of getting at the intention of parties, permits a wider latitude of investigation and a closer scrutiny into the transactions of parties when fraud is charged, and recognizes certain acts, relations and conditions, to be *indicia*, evidences, or badges of fraud.

The strongest *indicia* or badges of fraud recognized universally by all the courts appear in this case.

1st. The transfer of all the debtor's property. Bump on Fraud. Conv., p. 79 and note 2.

2d. Embarrassed circumstances of the debtor when conveyance is made. Bump, p. 80, note 4.

In order to affect vendee notice must be brought home to him, which is done in this case.

3d. Pendency of a suit or expectancy of a suit. *Idem*, p. 81.

4th. A false recital is a badge of fraud. *Idem*, p. 81. A false recital or statement of the consideration is a badge of fraud. *Idem*, p. 85.

In this case the deeds from Looney to Herlihy and from Herlihy to Wolfe are made evidently with the inten-

tion of leaving the impression that the consideration was paid in cash, when no cash was paid, either by Herlihy or Wolfe for the land in controversy. Again, the answer, under oath, positively asserts that cash was paid, contrary to the fact.

5. The retention of possession of the land and the exercise of unequivocal acts of ownership over it. *Idem*, p. 90.

Selling to debtor's son is a proof of fraud. *Idem*, p. 92. *Phitteplace vs. Sales*, 4 Mason, 312.

Here the debtor's wife collected the rents, after deed to Herlihy; we have a son-in-law instead of a son as grantee.

6. Transactions out of the usual course of business. *Idem*, p. 92.

(a.) Alienation of valuable property without payment, or security. *Idem*, p. 93, note 5. 1 Bland, 567.

(b.) Immediate transfer to another in consideration of property conveyed to debtor's wife. *Idem*, p. 93; *Newman vs. Ardell*, 448; 43 Barb.

7. Unusual mode of payment.

"The facility with which fictitious payments may be fabricated renders it necessary for the grantee to produce all the proof which may reasonably be supposed to be in his power, of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud. This requirement is not met by the mere proof of payment, without any attempt to show where the money came from, how it was obtained, whose it was, or what was done with it." *Bump*, pp. 94, 95; *King vs. Moon*, 42 Mo., 557; *Jackson vs. Mather*, 7 Cow., 301.

8. Absence of evidence. The omission of the grantee to testify or to produce the debtor or any other important witness, is the ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the question of fraud. *Bump*, pp. 95, 96, note 1.

9. Relationship, though not a badge of fraud, strengthens the presumption that may arise from other circumstances.

"Son-in-law" is such a relation as is "cousin." They are the persons with whom a secret trust is likely to exist.

Whenever this confidential relation exists, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction. Bump, pp. 97, 98; Duvall *vs.* Waters, 1 Bland. 567.

There must be good faith as well as a valuable consideration paid by the vendee in order to protect him. Bump, 230; Glen *vs.* Randall, 2 Md., ch. 220; Clements *vs.* Moore, 6 Wall., 299.

Though the vendee must know of the fraudulent intent of the grantor, actual knowledge is not necessary. What will put a prudent man on inquiry is sufficient. Bump, 232. What notice is sufficient, see Bump, 478; Baker *vs.* Bliss, 39 N. Y., 70; Martel *vs.* Somers, 26 Texas, 551.

Fraudulent grantee is a trustee for creditors, and can, as such, be held responsible. Bump, 567; Clements *vs.* Moore, 6 Wall., 299.

It is respectfully submitted that there is no error in the decree of the court below.

WILLIAM A. COOK and H. B. MOULTON for defendants:

The averments of the bill—if mere enunciations of information and belief can be regarded as allegations at all—are directly, fully and absolutely denied by the answers.

The answer of Wolfe not only denies all statements of fraud, but goes further and presents a narrative of the purchase, consideration, etc.

The answer of Looney also denies the statements as to fraud.

Responsive as these answers are, in the absence of full and clear antagonistic evidence, or an accumulation of contradictory circumstances, equivalent to such evidence, they must be regarded as destructive to the bill. Seitz *vs.* Mitchell, 94 U. S., 582; Parkes *vs.* Phetteplace *et al.*, 1 Wall., 684.

But there is no contradictory evidence.

The complainant, several months after the decree *pro confesso* against Herlihy, produced him as a witness; but in-

stead of sustaining the bill, his testimony refutes it, and corroborates the answer of Wolfe, whatever may have been the purpose of the decree *pro confesso* against Herlihy and the subsequent use of him as a witness. And, in fact, the entire testimony corroborates the answer of Wolfe.

Opposed to it there is not a single established fact and only faint and insufficient circumstances.

The defendant took no testimony. His answer was full and complete. The witnesses he might have called were produced and examined by the complainant, thus rendering it unnecessary for the defendant to do so.

But further examination of the case in this form is unnecessary.

Nearly all the law applicable to the case is so fully, clearly and ably presented in an opinion of this court, delivered by Mr. Justice Hagner in *Clarke vs. Krause et al.*, 2 Mackey, 559, that a mere reference to it is deemed sufficient.

Mr. Justice MERRICK delivered the opinion of the court.

This was a bill filed for the purpose of vacating as fraudulent a deed which was made by Looney to his brother-in-law, the brother-in-law selling the same property to John G. Wolfe. So far as one-half of the case is concerned the complainant has sustained it by evidence; that is to say, he has very effectually and conclusively proved that Looney transferred the property in fraud of his creditors, to his brother-in-law, Patrick Herlihy.

But, unfortunately the proof of that does not establish the plaintiff's right to recover, because that grantee transferred the property, in his turn, to John G. Wolfe, the party against whom the bill is filed, and there is no proof in the case whatsoever, either by the answers or by any of the witnesses whom the complainant has convened for the purpose of establishing his demand, that Wolfe did not pay a *bona fide* consideration for the property; nor is there any proof that he was implicated in the fraudulent designs of the original grantor to the original grantee.



It is true there are a great many circumstances of suspicion surrounding the case, and if we were as private individuals, to indulge in those suspicions which prudent men are bound to entertain in order to guard themselves in ordinary transactions, we might come to the conclusion that the complainant has arrived at, that the second deed, as well as the first one, was fraudulent in law. But courts of justice are not allowed to indulge in speculation, but must adhere to the fixed rules of evidence made for the regulation of human affairs, and in the end they work much more substantial justice than does the indulgence of the caprice of the individual judgment of a man, however wise he may be, as applied to the particular instance.

Finding, then, that the answer of the defendant, John G. Wolfe, under his solemn oath, denies all fraud and avers a valuable consideration to have been paid for the property; finding that the very witnesses that the complainant has relied upon, while admitting there is fraud in the first grantee, with equal earnestness deny any fraud in the second grantee, the court is unable to see on what foundation in law the complainant can rely.

If he had pursued his inquiries into the fraud of the second grantee, with the same diligence of effort which he used to prove fraud in the first grantee, and as he might have done by the examination, possibly, of other witnesses and the arrangement of collateral facts, he might have established that which he has failed to establish.

The court cannot, by any suggestion or inference of facts, in the face of that rule of law which says that fraud is odious and not to be presumed, presume anything. The fraud must be proved, and the court cannot supply the deficiency of proof. The record, therefore, shows to us that he has failed in his contention and that the decree below must be reversed.

## JOHN P. JACKSON vs. HENRY E. DAVIS, Administrator.

EQUITY. No. 7,990.

{ Decided June 15, 1885.  
{ Justices COX, JAMES and MERRICK sitting.

Where one of two sureties on a bond given to the United States pays the debt of the insolvent principle, he is entitled, in his claim for contribution, to be subrogated to the priority of the United States over the other creditors of the estate of his co-surety.

## STATEMENT OF THE CASE.

Bill in equity by a surety against the administrator of his co-surety to enforce contribution. The material averments of the bill were as follows:

That on the 2d of September, 1865, Oscar H. Burbridge, as principal, and Philip B. Fouke, John C. Forbes, and the complainant, John P. Jackson, as sureties, executed a joint and several bond in \$25,000 to the United States, conditioned for the faithful discharge by Burbridge of the duties of the office of Supervising Special Agent of the Treasury Department; and the due accounting for all public moneys and property coming into his hands by virtue of that office.

That Burbridge entered upon the discharge of the duties of his office and failed to account for a sum of public money greatly in excess of the conditions of the bond.

That the United States entered suit against the parties to the bond, but process was had only on Burbridge and complainant.

That Burbridge and complainant appeared and defended the suit, but verdict was rendered and judgment entered against them, November 22, 1875, for \$36,560.50, with interest.

That complainant subsequently paid the sum of \$30,466.47 on this judgment and procured it to be entered satisfied, the entry of satisfaction showing the amount actually paid.

That Burbridge and Forbes, one of the sureties, at the time of the breach of the condition of the bond were, and

ever since have been, and still are, utterly insolvent and unable to pay the penalty of the bond, or any part thereof.

That neither Burbridge, nor Forbes, nor Fouke, has ever contributed anything to reimburse complainant for his payment in satisfaction of the penalty of the said bond.

That Fouke, the defendant's intestate, died solvent, and when the assets of his estate are reduced to possession, they will suffice to discharge the debts of the estate.

That the estate of the said Fouke is liable to the complainant for a contribution to the extent of one moiety of the amount paid by the complainant to the United States in satisfaction of the bond; and that by virtue of his said payment to the United States, the complainant is subrogated to all the rights originally pertaining to the United States as a creditor of said estate under the bond; and that by virtue of such subrogation he is made a preferred creditor of said estate, and in the event the assets thereof should prove insufficient to discharge its liabilities, he is entitled to have his demand paid in preference to any and all other liabilities of said estate. The bill concluded with a prayer that the defendant's administrator be decreed to pay to complainant one moiety of the amount paid by complainant in satisfaction of the penalty of the bond, and that the payment be made in preference to any payments to any other creditor of the estate.

The defendant answered, calling for strict proof. Testimony was taken in support of the averments of the bill. The case was then certified to the General Term to be there heard in the first instance. A number of points were raised by the defendant on the hearing, such as the Statute of Limitations, non-joinder of parties, &c., but were overruled by the court upon consultation on the bench, the Chief Justice announcing that the court would hear argument only on the question of the right of the plaintiff to be subrogated to the priority of the United States.

RANDOLPH COYLE for complainant:

1. Complainant is subrogated to the rights of the United

States against the estate of his co-surety, and even if the estate be not solvent, his claim has priority of all others as far as the assets will go towards paying it, to an amount not to exceed one moiety of that paid by complainant.

Section 3466 of the Revised Statutes of the United States provides that, "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."

Under this provision of law, the United States were entitled to priority of payment out of the estate of Fouke (upon his death insolvent) of the debt for which he was bound as surety of Burbridge, and the debt having been paid by complainant, he "is permitted on the principle of subrogation to stand in the shoes of the United States, and to recover and receive from the estate of said decedent [intestate] what the United States would have been entitled to receive therefrom if the payment aforesaid had not been made by" the complainant. *Robertson vs. Trigg's Adm'r*, 32 Gratt., 76, 85.

The case last cited is, so far as it is in point, a cross-bill for contribution by two sureties on an official bond given to the United States, against the estate of a co-surety, in which the doctrines of contribution and subrogation are carefully reviewed.

Referring to section 3468, R. S., providing substitution of the surety who has paid the debt of the principal, to the right of priority of the United States against the estate of the principal, and considering the argument therefrom "that because the statute makes no express provision for substitution of a surety to the rights of the creditor against a co-surety, it was intended to exclude such substitution on the principle, *expressio unius est exclusio alterius*," the court say:

"We are not prepared to say that the remedy provided by the statute, for the surety against his principal, would not have existed under the general rules of equity, as ad-

ministered in the federal courts, independently of any statutory provision. Whether that be so or not, the rule of substitution for the purpose of enforcing contribution between sureties is too well established in equity jurisprudence to be set aside by implication of less force than an express statutory denial of the remedy."

The question of the right of subrogation as between co-sureties was exhaustively treated by Chief Justice Marshall in *Lidderdale vs. Robinson*, 2 Brock., 160, and affirmed by the Supreme Court in 12 Wheat., 594. See also case of *Hess' Estate*, 69 Penn. St., 275; *Fleming vs. Beaver*, 2 Rawle, 128; *Smith vs. Rumsey*, 33 Mich., 183; *Felton vs. Bissell*, 25 Minn., 15; *Howell vs. Reams*, 73 N. C., 391; *Cuyler vs. Ensworth*, 6 Paige, 32; *Cheesborough vs. Millard*, 1 Johns. Ch., 409, 413; *Scribner vs. Hickok*, 4 Johns. Ch., 531; *Lawrence vs. Cornett*, 4 Johns. Ch., 545; *Croft vs. Moore*, 9 Watts, 451.

II. What proportion of the amount paid by him is complainant entitled to recover from defendant?

In equity the rule (differing from that at law) is that the proportion is to be determined by the number of solvent sureties. "Thus [at law], if there are four sureties, and ~~one~~ <sup>one</sup> ~~is~~ insolvent, a solvent surety who pays the whole debt ~~can~~ <sup>can</sup> recover only one-fourth part thereof (and not a third part) ~~against~~ <sup>against</sup> the other two solvent sureties. But in a court of equity he will be entitled to recover one-third part of the debt against each of them; for in equity the insolvent's share is apportioned among all the other solvent sureties." Story's Eq. Jur., § 496, and cases cited. *Robertson vs. Trigg's Adm'r*, 32 Gratt., 76.

RIDDLE, DAVIS & PADGETT for defendant:

The complainant is not subrogated to the priority of the United States against the defendant's intestate.

The priority of the United States, or of a surety, in such cases depends upon sections 3465 and 3468, R. S., which are as follows:

SEC. 3466. "Whenever any person indebted to the United

States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

SEC. 3468. "Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects come to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States, the money due upon such bond, such surety, his executor, administrator or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or in equity, in his own name, for the recovery of all moneys paid thereon."

The right of priority of the United States does not rest in any prerogative, as in the case of the crown in England; but it is exclusively founded on the provisions of the statutes. *U. S. vs. State Bank*, 6 Pet., 29.

And in case of insolvency, the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency, manifested by some notorious act of the debtor pursuant to law. It must be a technical insolvency, of one of the three sorts indicated by sec. 3466. *Prince vs. Bartlett*, 8 Cranch, 431; *Thelusson vs. Smith*, 2 Wh., 396; *Conard vs. Ins. Co.*, 1 Pet., 439; *Beaston vs. Farmers' Bank*, 12 Pet., 102; *U. S. vs. McLellan*, 3 Sumn., 351, 352; *U. S. vs. Wilkinson*, 5 Dill., 275; *U. S. vs. King*, Wal., C. C., 12.

So, the right of a surety to priority depends exclusively on the statute provisions. Without the statute, a surety would at best rank as an ordinary specialty creditor in every case; the statute improves his condition in one particular, viz., it promotes him to the priority of the United States *as against his principal*.

Thus it is held that a surety who pays a bond to the United States, has the same priority as the United States against the principal, or his estate, but no other advantages secured to the United States. *U. S. vs. Hunter*, 5 Mason, 62; 5 Pet., 173; *U. S. vs. Preston*, 4 Wash. C. C., 446.

Nor is the question in anywise affected by the general equity principle that entitles a surety paying a debt to succeed to the rights of the creditor. That principle has reference to such advantages as the creditor may have in the form of the instrument of indebtedness, or lien or other security. The position of a surety in that respect is wholly outside that of a surety within the contemplation of the statute. The advantage secured to the surety in ordinary rests upon certain general equitable principles, which were clearly ascertained and established at the time the statute was passed. But the statute makes no reference to them, and its terms exclude all consideration of them in the particular case provided for.

A surety who pays a bond is not entitled to be subrogated to the rights of the United States against his co-surety, so as to give his demand for contribution a preference over other creditors; nor on general principles of equity can he claim to stand in the place of the United States as against the co-surety. *Pollock vs. Pratt*, 2 Wash. C. C., 490; *Bank of S. C. vs. Adger*, 2 Hill's Ch. (S. C.), 262.

Mr. Justice MERRICK delivered the opinion of the court.

This was a bill in equity filed for the purpose of subjecting the estate of an insolvent decedent to the claims of the co-surety of the decedent upon the bond of a principal, which had been given to the United States for certain duties in the collection of moneys. The principal had become insolvent, other sureties had become insolvent, the defendant's

intestate died, but, before his death, the liability became fixed by the co-surety paying the entire claim. He then came into this court by his bill in equity and claimed the priority of the United States by way of substitution, under the ordinary doctrine of substitution and subrogation held by courts of chancery. And the only question in the case is this: Whether, under such circumstances, a co-surety is entitled to be subrogated to the priority of the United States over the other creditors of the estate of the decedent.

The statute gives to the United States priority over all creditors to the estate of the principal debtor, and also gives to the sureties of the principal debtor this right of priority over the estate of the principal debtor where they have paid the debt. But the statute is silent as to the right of subrogation to that priority as between the estates of co-sureties.

The question to be solved here is whether, under the circumstances, one co-surety is entitled, as against the estate of a deceased co-surety, to the assertion of this priority over the other creditors for his benefit to the extent of the contributory share of the deceased surety which was paid by him to the United States.

Upon an examination of the authorities it seems to be entirely clear that the right exists. There is one case reported in 32d Grattan, 76, the case of *Robinson vs. Trigg's Administrator*, where the precise question was presented, and there that very learned court, relying upon the antecedent decisions, to one of which I shall advert in a moment, used this language (p. 87):

"Whether or not the remedy provided by the statute for the surety against his principal would have existed independent of the statute, yet the rule of substitution for enforcement of contribution as between sureties is too well established in equity jurisprudence to be set aside by implication of less force than an express statutory denial of the remedy."

This case and the other cases are based upon the decision of Chief Justice Marshall, to be found in the opinion in



the case of *Lidderdale vs. Robinson*, reported in 2 Brockenborough, 168—the opinion, I should say, of Chief Justice Marshall himself, because there was a difference of opinion between him and the circuit court judge which was certified to the United States Supreme Court, and there the opinion of the Chief Justice was affirmed without hesitation. Chief Justice Marshall, in that so certified opinion, says that the right of subrogation (passing now ordinary co-sureties—he was not speaking about them, but the particular doctrine of substitution) stands, as respects the claim of the surety who pays the debt, upon the principles incontrovertibly established to every purpose in the place of the creditor.

That case went to the Supreme Court of the United States, and the decision was affirmed in the most unqualified manner. Mr. Justice Johnson, delivering the opinion of the court, comments upon the argument of hardship made on behalf of the other creditors in case the doctrine of substitution should be allowed, and he answers it most conclusively. I read from the case of *Lidderdale vs. Robinson*, 12 Wheaton, 595. He says:

“The priority, therefore, of the holder of the bill of exchange as well against the estates of the endorsers as the drawer, is unquestionable, but the other creditors insist that, as between the co-endorsers, the rights of Smith against the estate of Robinson must be determined by the nature of the action to which he would have been put at law to recover back what he paid above his moiety, that is, *assumpsit* on simple contract. Both on principle and authority we are induced to think otherwise. What have the creditors of Robinson to complain of? They are only referred back to the situation in which they were before they were relieved by the application of Smith’s funds to the payment of the bill of exchange. If the bill of exchange still remained in the hands of the holder unsatisfied his right to a priority from Robinson’s estate as to the moiety of the bill would be unquestionable, and if relieved from that state by the money of Smith it is but right that Smith should have refunded to him that sum

which they, without that payment, would certainly have been obliged to relinquish."

So in this case. What have the creditors of Fouke's estate to complain of? They are only remitted back to the condition in which they were before the money of Jackson, the complainant, was applied to relieving and paying the debt for which they were bound. Fouke's estate would have been swept away by the principal creditor, the United States, the co-surety being compelled to come in and relieve that debt, they are in no worse estate than they would have been if the United States had asserted its own rights in the first instance.

After commenting upon the general doctrine, and referring to the fact that the decision might have been supposed to have been based upon the law of Virginia recognizing the right of substitution, and for the purpose of excluding that idea, Justice Johnson, then, in his opinion on page 598, uses this emphatic language:

"That this, then, is the settled law of the State, in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground since we are well satisfied with its correctness on general principles and on authorities of great respectability in other States."

In the course of my investigations I have discovered a decision in the State of Maryland which was not referred to in the argument, and which I quote along with the case in 110th United States, for the purpose of showing that the right of substitution applies equally well where the right of preference has originated out of prerogative, as where it originates out of positive statute or out of contract. The doctrine is broad enough to cover all cases, and it stands upon the broad claim of absolute right, not upon contract, not upon statute, not upon prerogative, but upon the broad claim of the right in equity as between man and man; that one who has been subjected, by the action of the dominant creditor, over whose will he has no control, to an undue proportion of the burden, should be relieved by

being placed in the condition of the dominant creditor for the purpose of working out the equities as between himself and his co-sureties.

The case of *Orem's Executrix vs Wrightson*, reported in 51st Maryland, at page 34, was a case where parties had become sureties upon a tax collector's bond, and one of them had been obliged to pay the whole. He then sued the insolvent estate of his deceased surety, and he was, by the decision of the Court of Appeals, held entitled to succeed to the priority of the State of Maryland. The court, at the bottom of page 42, after showing that in many previous cases the right of priority had been vindicated by the Court of Appeals of the State, as the prerogative right and the flower of sovereignty, says:

"In the present case, there being no liens in the way, the State was clearly entitled to be first paid out of the assets in the hands of the administrator of Leeke. The next question to be examined is, to what rights, if any, the appellees, as sureties of Leeke, are subrogated by their payment to the State of the debt due by him, at the time of his death, as principal debtor. The doctrines of subrogation, or substitution as it is also termed, is a peculiar feature of equity. It is not founded in contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of creditor, and gives him every right, lien and security to which the creditor could have resorted for the payment of his debt."

Then he goes on and discusses all the cases, from *Deering vs. Earl of Winchester*, down. Then at the bottom of page 45 and on page 46, he says:

"If, therefore, the creditor could have rightfully claimed a preference in the distribution of assets, the same preference will be upheld by way of subrogation for the benefit of the surety. Is a different rule to be applied where the State is a creditor?"

That is to say where the right of priority flows out of prerogative or out of a statute. He continues:

"We can see no reason why it should be. It is not necessary to inquire how or in what manner the State's right to rank as a preferred creditor is derived, whether it is a prerogative right derived from the common law, or whether it has been conferred by statute. As it is said in some of the cases to which we have referred, equity, in applying the doctrine of subrogation, looks not to form but to the substance and essence of the transaction. It looks to the debt which is to be paid, add not to the hand which may happen to hold it, and will see that the fund charged with its payment shall be so applied."

The Supreme Court of the United States, in 110 U. S., in the case of the United States against Ryder, where the claim was made of the subrogation of the bail in a criminal case to the right of priority, deny the right of subrogation of the bail on account of public policy. But while they deny that, they review the doctrine of subrogation at common law and especially refer to the recognized doctrine of subrogation to the right of prerogative of the Crown of England. So it has been applied from the time of Magna Charta in favor of sureties and also in favor of one surety against his co-surety, so as to vindicate the justice of the particular case in all instances irrespective of the sources from which the right to priority has flowed to the principal creditor.

I read a passage from page 733 of the opinion of the Court delivered by Mr. Justice Bradley. After discussing the case of *Dering vs. The Earl of Winchester*, to be found in 1st White & Tudor's Leading Cases in Equity, 100, he goes on to say:

"The doctrine is that a surety paying the debt for which he is bound is not only entitled to all the rights and remedies of the creditor against the principal for the whole amount, but against the other sureties for their proportional part. This is clearly the rule where the principal obligation is the payment of money or the performance of a civil duty. And in England the sureties of a debtor to the king (as for duties, taxes, excises, etc.,) have always, since *magna*

*charta*, at least, had the right, upon paying the debt, to have the benefit of prerogative process, such as extent or other crown process adapted to the case, to aid them in coercing payment from the principal and compelling contributions from co-sureties."

So that it is quite apparent that the doctrine of prerogative out of which the doctrine of priority arises, is no qualification of the right of a co-surety to be placed in the exact position with all the rights and exclusiveness of the principal creditor as against the party for whom he has paid his money.

One other remark. It was suggested that if such a doctrine were allowed, it would tend to impede the facility, and diminish the chances, of obtaining sureties on official bonds. The Court of Appeals of Maryland, in this case to which I have referred, mention that subject too, and takes just the opposite view, as I shall, of that matter. At the close of the opinion to which I have referred, they say, at the bottom of page 46:

"While this view of the law will do no wrong to any one, it will add facilities in securing and collecting the revenue of the State. If sureties know that they can be subrogated to the priority of the State, less apprehension will be felt in joining in the bonds of collectors, and less delay in payment of solvent securities, other creditors are not injured, for if the State has the first claim upon the funds, it does them no wrong whether this claim is enforced by the State or by those standing in its stead."

This brief review of these authorities and a multitude of others to which I could have referred, show that every objection which has been urged is without foundation in the present case, and the party complainant is entitled to the right which he claims at the hands of a court of equity to be substituted, and to be paid the contributory share of his co-security out of the assets of the decedent, to the exclusion of all his other creditors, and it will be so ordered.

Mr. Justice JAMES, dissenting:

I dissent from the opinion of the majority of the court with reluctance, and only because I believe that this court simply has no power to deal with a priority given by statute to the United States as we might deal with the priority of a private party, and to subrogate a surety as against a co-surety to that priority, in the absence of any statute authorizing us to take possession of and apply that government remedy for the collection of a debt to the public. So far from justifying the exercise of such a jurisdiction, the judgment and the reasoning of the Supreme Court in *Lidderdale's Ex'rs vs. Robinson's Ex'rs*, 12 Wheat., 594, seems to me to forbid it.

The principle on which the power of a court of equity to subrogate sureties to the securities and remedies of the creditor stands, is that the creditor, when paid by the surety, is under an equitable obligation to turn over to the surety such securities and remedies, and that this obligation can be enforced. In *Lidderdale's Ex'rs vs. Robinson*, the plaintiffs' testator had, as a joint endorser with the defendant of a bill of exchange, paid more than his share of the debt. Mr. Justice Johnson, in stating the case, said: "There is no question on his right to come in for that sum as a simple contract creditor; but he claims precedence, and the rank of a judgment creditor, under a particular provision of the laws of Virginia, and under an equitable principle, according to which he who pays a debt of a superior dignity is supposed to rank, in the application of assets, according to the dignity of the debt satisfied; or, in other words, is substituted for the creditor who held the prior debt." The law of Virginia referred to placed protested bills of exchange, after the death of the drawer or indorser, on a level with judgments and these had priority. The court stated the principle as follows: "That a surety who discharges the debt of the principal shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are them-

selves, in many respects, regarded as sureties. 2 Vern., 608; 11 Ves., 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But in the cases last cited we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step further to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment \* \* \* If the parties in this cause be considered as claiming under assignment from the holder of the bill, and each as assignee of the claim against his co-indorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed." The remainder of the opinion is merely a demonstration that the court may enforce the obligation without an *actual* assignment, and as if it had been made. The chief justice, in deciding the same case in the circuit court, had said: "Where there is a principal and surety, and the surety pays off the debt, he is entitled to have an assignment of the security." The right of the surety was rested on the same principle in England. In *Ex parte Crisp*, 1 Atk., 133, Lord Hardwicke said, that where the surety paid off the debt he was entitled to have from the creditor "an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion;" and in *Morgan vs. Seymour*, 1 Ch. Rep., 64, the court decreed that the creditor should assign his bond to the two sureties, to the same end. It is true that, since the decision of *Copis vs. Middleton*, it is held by the English chancery courts, though not in this country, that, in the case of a bond or other instrument for the debt, payment by the surety extinguishes the instrument, so that it cannot be so assigned; but that case only confirms the doctrine that the substitution of the surety stands upon the principle which I have indicated,

and that he cannot be substituted where the court has no power to compel an assignment. See, further, *Hodgson vs. Shaw*, 3 Mylne & Keene, 191; *Clasan vs. Morris*, 10 Johns., 524; *Cuyler vs. Ensworth*, 6 Paige, 32; *Eno vs. Crooke*, 10 N. Y., 66; *Burge on Sur.*, 355; *Sheldon on Subrog.*, sec. 87.

Now the modern practice, by which the surety is allowed to avail himself of the creditor's securities and remedies, without an assignment and without making the creditor a party, has not, of course, affected the principle upon which the powers of the courts of equity rest, nor enlarged the jurisdiction of those courts. That jurisdiction still depends upon the power which equity has to compel the performance of the creditor's obligation to turn over to the surety, who has paid the debt, any securities and remedies which he himself had acquired for the collection of that debt from the principal or another surety. If this is the basis, and therefore the measure, of the power of equity, in the matter of substitution, it follows that no court of equity in this country, either of the United States or any one of the States, has jurisdiction or power to substitute a surety to the priority of the United States, except just so far as the United States have by statute consented that they may do so. It may be that, where the United States have taken from the principal or one of the sureties a mortgage or other similar contract security, the government may be treated as a party to an ordinary contract, and such consent may be implied; but I do not perceive how any such consent can be implied in the case of a security in the form of a remedy provided by a public statute; especially in the face of a statute which contains an express and limited consent to a subrogation to such remedy. The judicial power conferred by the Constitution is power *in invitum*, and is not power over the United States, any more than the judicial power of the English courts, theoretically derived from the king, is power over the king. When such power is apparently exercised by those courts, it is always by the king's consent, and not as power. I do not mean, by this comparison, to imply that the superiority of the United States to the control *in invitum*



of their own judicial power, rests upon any such analogy. It arises from construction of the Constitution which establishes and defines that power. In accordance with this principle, Congress has always been careful to provide by statute the extent to which private parties may avail themselves of its securities, and in accordance with this principle they cannot do so in any case to which the United States are not shown to have consented.

The practice of the Exchequer Court in allowing the sureties of crown debtors to use the crown process against their principals and co-sureties, has been referred to as if it were an example of the power of equity to do the same thing. The true character of the proceedings in such cases is shown in *Regina vs. Salter*, 1 Hurlst. & Norm., 274, and by the cases cited in the note to *The King vs. Bennett*, 1 Wightwick, 1. In *Regina vs. Salter*, the application on behalf of the sureties was for an order that they should be placed in the situation of the crown, and that the writ of extent, which had issued against the defendant (the principal on the bond), should be put in force in their behalf, until they should be reimbursed what they had paid. The order was *nisi*, and was afterwards made absolute, "counsel appearing on the part of the crown, and consenting." And this was the course taken in all cases. See *Regina vs. Robinson*, in a note to the case last cited. These cases involved the exercise of the peculiar powers of the Exchequer Court, and that court does not appear even to have been governed by the equity doctrine which has been appealed to; for, in a note to *The King vs. Bennett*, Wightw., p. 6, the reporter states that he had found on the order book of 1702 a case in which a *stranger*, who had offered to pay the crown's debt for the credit of the debtor, was allowed to have the crown's prerogative process. Clearly there is nothing in the practice of the Exchequer which tends to show that a court of equity has power to take possession of the remedies of the United States on behalf of a surety as against a co-surety.

Now Congress, so far from consenting that the priority

established for the United States should be controlled by the courts of equity so far as to apply it as between co-sureties, seems designedly to have excluded that particular case, while providing for such control and application as between the surety and his principal. Four statutes on the subject of priority were enacted in nine years, and the system was perfected only step by step, and from all of these laws the case of co-sureties was excluded. The act of August 4, 1790 (1 Stat., 169) provided only for the priority of the United States, and against the estates of debtors on customs bonds; making no provisions for sureties. Two years later, by the act of May 2, 1792, sec. 18 (1 Stat., 263), it was provided that sureties on such bonds should have, against the estates of their principals, the same priority which had been given by the earlier act to the United States. Five years afterwards, by the act of March 3, 1797 (1 Stat., 515), the priority of the United States was extended to the estates of all debtors, but nothing was said in that act about sureties, and their priority remained as limited by the act of 1792. Finally, the priority of the United States was further regulated, and priority was extended to sureties on other than customs bonds, by the act of March 2, 1799, sec. 65 (1 Stat., 676). In this extension of the right to a new class of sureties, the affirmative statement of the right was limited to priority against the estates of the principals on the bonds.

This condition of the statute law has been undisturbed for eighty-six years. Was it not intended to be the whole of the law on that subject? The authors of this legislation were not unacquainted with the doctrine of subrogation to the rights of creditors, as applied by courts of equity between co-sureties on bonds between private persons; and in providing for sureties, could not fail to consider that matter at some one of the various steps in perfecting their legislation on the subject of priority. I conceive that the legitimate conclusion to be drawn from the number of these steps, and from the final form of its action is, that Congress intended by this legislation to dispose of the whole subject of priority, so far as parties to public bonds were concerned, and

to determine by it precisely how far subrogation should be applied by the courts to the government's right of priority. From their own application of that doctrine, thus intended to be discriminating and final, subrogation to this government remedy, *as between co-sureties*, seems to have been designedly excluded. Even if it were true that the ordinary jurisdiction of equity would, without an authorizing statute, have included such control over such a remedy, this designed omission in a statute, manifestly dealing with the whole subject of priority, would amount to an exclusion of the power of equity to apply its ordinary rule to the omitted case. I do not mean, of course, that the courts of equity were thus deprived of power to enforce *contribution* among co-sureties, because a suit for that purpose is not mentioned in the statute. I confine the argument to the particular question of the control of equity over the peculiar remedy of priority given to the government. The principle of intended exclusion, to which I refer, has been applied so as to work even the repeal of a statute. In *Murdock vs. The City of Memphis*, 20 Wallace, 617, the Supreme Court considered the question whether the act of February 5, 1867, 14 Stat., 385, had the effect to repeal the 25th section of the Judiciary Act, when Mr. Justice Miller said: "A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it." *United States v. Tynen*, 11 Wall., 88; *Henderson Tobacco, Ib.*, 652; *Bartlett vs. King*, 12 Mass., 537; *Cincinnati vs. Cody*, 10 Pick., 36. *A fortiori* must a similar exclusion of a mere rule of equity, from what was intended to be a complete provision of

subrogation to priority, have the effect to do away, if it had ever existed, the power here asserted. We must, in such a case, suppose that the statute took that limited form because it was expected and intended to accomplish the whole policy of the government. And how it should be a question of mere policy is perfectly intelligible. In the first place, priority was given to the government itself because it was necessary that the government should be secure of its revenues. In the next place, and to the same end, it was important to obtain sureties on the bonds of its debtors, and, in furtherance of this policy, it was deemed advisable, and at the same time sufficient, to offer to those sureties the same remedies against *their principals* which the government itself had. It is on the very face of this line of statutes that the legislature assumed that these priorities were a matter purely of administrative policy, and that such only should be allowed as it was necessary to allow in the interest of the government. In estimating the effect of this legislation it should be further observed that the strictness with which the priority of the government itself has been treated by the Supreme Court, suggests that the whole matter stands upon the affirmative provisions of the statute, and that, beyond these, no priorities exist.

I am of opinion, then, that this court has not the power, as a matter of ordinary equitable jurisdiction, to control and apply to the use of a private party a priority given to the United States, except to the extent to which the legislature has expressly given consent, and that power to do so as between co-sureties is not within the consent actually given. And I conceive that, if such power might have belonged to the courts of equity without an affirmative grant or express consent, the intention of the legislature to exclude and forbid its exercise is apparent in the statutes to which I have referred.

I am aware that I give the more weight to the objections which have been stated, because I hold that priorities against the other creditors of an estate do not stand upon any

equitable ground, and are justifiable only on grounds of overruling policy or necessity. Equal distribution of an insolvent estate is the rule which commends itself to equity, a rule which is not to be forgotten by a court of equity when it is called upon to determine what, upon consideration of *all* the rights to be affected, it is equitable to do in such a matter as that before us. I do not conceive that we are called upon to apply the rule of substitution, on grounds of pure equity, to a special remedy given to the Government, with the effect of thereby ignoring the other creditors of the insolvent estate. And to my mind the suggestion that these other creditors have nothing to complain of, because they would have suffered just as much if the Government had enforced this priority for its own behoof, is of no force. I do not perceive how it follows from the fact that the United States had been given a legal right to such a priority, because it was indispensable that the Government should have its revenues, that therefore it was equitable that the general creditors should suffer to the same extent at the hands of a private party, in whose behalf no such necessity is recognized.

## THE DISTRICT OF COLUMBIA

vs.

## THE WASHINGTON &amp; GEORGETOWN RAILROAD COMPANY.

LAW. No. 22,457.

## THE DISTRICT OF COLUMBIA

vs.

## THE METROPOLITAN RAILROAD COMPANY.

LAW. No. 22,458.

{ Decided June 15, 1885.

{ Justices COX, JAMES and MERRICK sitting.

1. By the charters of the Washington & Georgetown and of the Metropolitan street railroad companies they are required to keep their tracks "for the space of two feet beyond the outer rail thereof, and also the space between the tracks at all times well paved and in good order." *Held*, that this language involved the obligation to construct a pavement where one did not exist on the line of their roads.
2. The authorities of the District have the right to prescribe the material of which this pavement shall be composed, and if a pavement has already been constructed, they may direct it to be removed and a pavement of a different character substituted.
3. Whenever the District authorities direct the grade of the the street or character of the pavement to be changed, it becomes the duty of the companies to conform their roads to the change.
4. And this obligation does not depend upon notice to the companies, it is incurred the moment they have knowledge that the change is begun or contemplated.
5. The District, on the failure of the companies to do this work, did the work itself, and thereupon issued certificates of indebtedness for the cost thereof against the roads. These certificates it sold to third parties. *Held*, that the District had no authority to issue such certificates, and the purchase of them by third parties gave the latter no right of action against the companies, nor did it discharge the liability of the companies to the District. Whether the District would be responsible to the purchasers for the money paid for these certificates is a question which cannot concern the companies.
6. The District is responsible for the condition of its streets, and in this respect stands in the relation of surety for the performance by the companies of their obligation to keep their roads in good condition; hence, on default being made, it may at once do the work and sue in *assumpsit* for the cost on the same theory that a surety, who discharges the defaulted obligation of his principal, does so upon his implied request and upon his implied promise to indemnify.

THE CASE is stated in the opinion.

A. G. RIDDLE and HENRY E. DAVIS for plaintiff.

W. D. DAVIDGE and NATHANIEL WILSON for Metropolitan Railroad.

ENOCH TOTTEN for Washington & Georgetown Railroad.

Mr. Justice Cox delivered the opinion of the court.

These were separate actions brought by the District of Columbia against the Washington and Georgetown Railroad Company and the Metropolitan Railroad Company respectively.

The charters of these two companies were passed respectively in the years 1862 and 1864. The charter of the Washington & Georgetown Railroad Company contains, in its fourth and fifth sections, the following provisions:

SEC. 4. "That the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order without expense to the United States or to the cities of Washington and Georgetown."

SEC. 5. "That nothing in this act shall prevent the government, at any time at their option, from altering the grade or otherwise improving Pennsylvania avenue and such other avenues and streets as may be occupied by said roads, or the cities of Washington and Georgetown, from so altering or improving such streets and avenues as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform it to such altered grade and pavements."

The provisions of the fourth and fifth sections of the charter of the Metropolitan Railroad Company are substantially the same as those of the Washington & Georgetown.

The declaration in each case set forth the defendant's charter, and in substance avers that the defendant failed to execute the work required of it by its charter, and the plaintiff was therefore compelled to cause the work to be executed

at its expense, and hence a right of action has arisen to recover that expense from the defendant.

In the course of the argument, the first question that was presented was, whether the obligation to keep the road at all times well paved and in good condition involved the obligation to construct the pavement where one did not originally exist. We are unable to see how that obligation can be fulfilled, of keeping the streets well paved, without constructing a pavement where one did not exist, and substantially that obligation was finally conceded in the course of the argument.

It was also conceded—in fact it could not be avoided, because the language of the law is too explicit—that when a change of grade was ordered by the authorities of the District, it became the duty of the defendant company to conform its road to that grade, and also to reconstruct its pavement in conformity with it.

The first really serious controverted question is whether the authorities of the District, who at that time were represented by the Board of Public Works, had a right to prescribe the nature of the material of which this pavement should be composed; so that if a pavement had already been constructed before the time of the Board of Public Works, whether it could ordain that it should be removed and a pavement of a different character substituted.

Before these charters were passed the authority of the city of Washington was derived from its charters of 1812 and 1820, and under those charters, the power was vested in the corporate authorities to cause the sidewalks and carriageways of the different streets to be paved upon the application of the abutting proprietors, and to charge the entire cost of the work to them. There was no restriction whatever; the corporate authorities were given control over the whole subject of pavements, including the grading, the material and everything else.

Excepting the entrance into the city, allowed by its charter to the Baltimore & Ohio Railroad Company, the granting of these two charters to the city railways was the first



instance in the history of the city, probably, in which a private corporation was allowed to occupy for its business any part of the public highway. It is to us inconceivable that such corporations should be allowed an uncontrolled discretion as to material, or as to any other question attending the exercise of this power. Here was the general control of the subject vested in the municipal corporation, and afterwards a private corporation was authorized to occupy a part of the public streets and the obligation imposed upon it of keeping that part well paved and in good condition. I say it is inconceivable that an uncontrolled discretion could have been intended to be vested in this private corporation. Naturally a collision would arise between this corporation—this private body—and the public authorities of the town upon this identical question, and the power must be lodged somewhere of determining of what material a street pavement should be composed. Now we should expect, before examining the law, to find somewhere that the power of the private body was subjected to some public control, and looking at the charter, with this conviction or, as you may call it, this prepossession, we find that a clause of the first section provides: "That the use and *maintenance* of said road shall be subject to the municipal regulations of the cities of Washington and Georgetown, respectively within their several corporate limits," &c. Perhaps the term use might be limited to the mere service of transporting passengers. But the *maintenance* of the road involves more; it involves the maintaining or keeping it, and applies as well to the construction of the road as to the maintenance of it. It seems to us that to subject the maintenance of the road to the municipal regulations subjects the whole question of construction to the general control of the public authorities. But, going further, we find in section 5 that it is enacted: "That nothing in this act shall prevent \* \* \* the cities of Washington and Georgetown from so altering or improving the streets and avenues," and then it is declared to "be the duty of said company to change their said railroad so as to conform to such

altered grade and pavements." The word "such," of course, refers to an antecedent, and as the term "pavements" had not been previously used in the statute, it was evidently included in the general term "improvements." That is to say, that nothing in the act should prevent the Government or the cities from altering the grade or otherwise improving the streets and avenues by new pavements or what not, and that then it should be the duty of the company to change the roadways to conform to such grade and pavement. Now, taking this in connection with the previous section that imposed upon the defendant company the duty of keeping the tracks well paved, and the requirements of this section that whenever the grade should be changed they were required to conform their road to the new pavement, it seems to us that a fair construction is that it devolves upon the corporate authorities the duty to prescribe the manner in which this new pavement should be constructed by the company.

Then, in 1871, while this was the relation between these private corporations and the corporations of the two cities, came the act which abolished the late corporate authority and established a new Government for the District of Columbia by which, in the 37th section thereof, is enacted, "That the Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues," &c. Could language be more comprehensive than this? There might be a question whether language more comprehensive than that contained in the charters of the city, could affect the chartered rights of the private corporations, already vested in them, but, as we have already expressed the opinion, that the corporate authorities of Washington and Georgetown had ample control of the subject, we think it only necessary for us to say that that control is vested in the new body, to wit, the Board of Public Works, and, therefore, we hold that that board had the right, in ordaining improvements and altering the grade, to prescribe the materials of which the entire new street should be constructed.

The main point relied upon in this case by the defence

in argument is, that the obligation of the companies was to construct these pavements only upon notice and demand that they should do so, and that they were not in default until that time, and that the District of Columbia authorities had no right to do that work and charge the cost to the defendant unless they had first been in default and failed to discharge their duty.

Now that will depend somewhat also upon the construction of the charters of the two companies. Repeating the language of section 5:

"That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or otherwise improving Pennsylvania avenue and such other avenues and streets as may be occupied by said roads, or the cities of Washington and Georgetown, from so altering or improving such streets and avenues as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such altered grade and pavements."

We see that it prescribes, not that it shall be their duty *on demand and notice*, but *upon the happening of an event*, and that event simply was the alteration of the street by the corporate authorities or by the United States.

Now it is true that when a person is bound by a contract to do a certain thing upon the happening of an event, the knowledge of which is confined to the other party to the contract, he is not in default for not doing the thing until that knowledge is communicated to him. But in this case it would be preposterous to maintain that these companies did not have ample knowledge and *notice*, in that sense, of the proposed progressive improvements and changes. The law does not require that they shall execute the work upon being notified and demand being made upon them to do it, but in the event of a change being made by the United States or by the District authorities. All that is necessary for them to have is knowledge that the proposed improvement is begun or contemplated. That knowledge

may be derived from any other source than the corporation. The first stroke of a pick in the streets would be sufficient to bring knowledge home to them. The first block of wood pavement, or the first wheelbarrow of dirt, placed along the street or thrown into it, would be sufficient to communicate a knowledge which would raise the obligation to conform to the proposed alteration.

Now, taking up first the case of the Washington & Georgetown Railroad Company, it is very easy to find in the record—both in the correspondence and in the testimony—ample evidence of knowledge on the part of the defendant that the work was going on. We find, for instance, page 59 of the record, under date of April 9, 1872, a notice from the vice president of the Board of Public Works to the president of the railroad company, that—

“The board are now paving the carriageway and east side of Centre Market from canal bridge to Pennsylvania avenue with treated wood. It is noticed that you are paving between and in the railroad tracks with cobble stone. The board intend to have the whole carriageway 'paved alike and have so directed the contractor.”

Again, another letter under date of May 20, 1872:

“Mr. L. S. Filbert has been directed to remove the cobble stones from between the tracks of the railroad on New York avenue, between 14th and 15th streets, and at the intersection of New York avenue and 14th, and to pave the same with the Scharfe pavement, the same as the rest of the street,” &c.

So in the testimony on page 67:

“The plaintiff then called as a witness the superintendent of the defendant, and by him gave evidence tending to prove that he was such superintendent during the years 1871, 1872, 1873 and 1874, and that when the pavements mentioned in the declaration were laid along the line of the railroad of the defendant, in the streets and avenues mentioned in the declaration, he knew of the laying of such pavements, and that the cars of the defendant, in charge of its conductors and drivers, were running along and over the

said streets and avenues before and during the progress of said work, and that the grade of defendant's railroad was, from time to time, by it changed and altered, as occasion required, during the progress of said work so as to conform to the grade established by the plaintiff, and the space between the exterior rails of the defendant's railroad was, when the grade was changed, paved by it while the plaintiff was improving the streets and avenues mentioned in the declaration."

Perhaps the most conclusive fact, however, upon this question is that the railroad company, claiming that it had the right to lay this pavement and that the District had not the right to do it, filed its bill in this court to enjoin the District from laying the pavement between the exterior rails of its two tracks, and obtained an injunction against it, and then actually did the work between its rails, which the Board of Public Works required to be done. This action is brought against this company, not for that work, but for the work of laying the pavement between the exterior rails and a line two feet outside of them on each side of the double tracks, that part of the work which the statute required the company to do and which it did not perform, leaving that to be done by the District; the work between the rails was executed by the company itself.

Now, of course, this very proceeding to enjoin the District from executing the work from between the rails is proof demonstrative that the company was well advised of the work that the board had directed to be done. Knowing of that then, and actually doing the work within the exterior rails, the company simply failed to do the work required of them between the exterior rails and a line two feet outside. They never offered to do that, as the evidence shows, but acquiesced in the execution of that work by the District authorities.

Here then, is proof of an omission or failure on the part of the defendant to do the work, if an omission or default is necessary to give a right to the District, on default, to execute the work and charge the cost to the defendant. The

ground upon which that right is rested will be considered a little further on.

Another point made by the defence is, that the District authorities proceeded upon the theory that the railroad company had not the right to do this work between the rails, but that the District had the right, and it was their duty to execute the work itself. It is not claimed that the District authorities—the Board of Public Works—claimed that they had a right or admitted that it was their duty to do this at the expense of the District ultimately, but simply that they had a right to do the work in the first instance, and at the expense of the defendant. That they expected the defendant to pay for it is very clear from the whole of the testimony.

It appears from an abstract from the minutes of the Board of Public Works, under date of August 21, 1872, that Mr. Riker, the president of the defendant company, was at one time personally present before the board, and this took place:

“Mr. Riker *et al.*, representing the W. & G. R. R. Co., called upon the board in relation to the track on Pennsylvania avenue east, and were informed that the board would not consent to have the track remain in the centre of the street as at present, but would insist upon its being removed to either side of the park from 1st to 8th street east. The board said that, so far as they were concerned, they were inclined to assess the property of the railroad company in the same manner as that of private individuals were, under the law, if it could be done.”

Immediately after the execution of the work, the Board of Public Works issued certificates of indebtedness against the property of the company. What they did claim was, that having this entire control over the streets, and having a responsibility for their condition, they must do the work in the first instance, but charge it to defendants.

But it is claimed that this was a groundless pretence upon the part of the board, and that they had no right really to interfere with the companies in the execution of

the work, that they really took it out of their hands to do the work, which the statute required them to do, and prevented them from performing their contract; in other words, it is insisted that the defendants were not in default. Now, it is true if one party to a contract prevents the other party from performing his part of it, it does not lie in his mouth to claim a default. If the District authorities by setting up this claim prevented the defendant from doing the work, perhaps there might be some ground upon the part of the defence for resisting, at least, the claim to the extent to which it is made by the District authorities. Did this claim upon the part of the District prevent either of the defendants from doing the work which the statute required them to execute. This is answered in the injunction proceedings to which I have already referred.

The Washington & Georgetown Railroad Company, denying the right of the District authorities to do the work, obtained an injunction against the Board of Public Works preventing them from doing the work between the exterior rails. Therefore it is plain that the claim of the District authorities did not prevent the company from doing the work. The very contrary was established by the case in question. They did the work to the extent to which they asserted the right to do it, that they desired to do it, but not to the extent to which the law imposed the duty upon them to do it.

In the case of the Metropolitan Railroad Company, there was no effort made to interfere with the District authorities, but the latter were allowed tacitly to go on and do the whole of the work.

In the case of the Washington & Georgetown Railroad Company, the District was prevented from doing the work between the rails, but the company tacitly acquiesced in the execution of the work outside of the rails. It is therefore plain, as it seems to us, that this position taken by the District did not prevent the defendant from executing its duty, and therefore was not a discharge and did not prevent it from being in default.

Another question is made as to the effect of the acts of Congress of June 19, 1878, and June 27, 1879, which are said to ratify the assessments made by the Board of Public Works. It is said that the Board of Public Works, in executing this work or a part of the work, undertook to issue certificates of indebtedness against the property of the railway company, and also that in some instances their course of proceeding was to charge the whole cost of the paving of the street, including the cost of paving which the defendant company had to do, against the adjoining lot holders. Now, in 1878, as we know, an act of Congress directed that the Commissioners of the District of Columbia should proceed to collect the assessments made in pursuance of the act of the legislative assembly of August 23, 1871. It is said that this act was a ratification of the assessments of the cost against the lot holders and that it was not afterwards in the power of the Board of Commissioners to change that assessment and recharge a portion of it to the railroad company; that is, to re-charge to the railroad company so much of the cost of the pavement of the street as they ought to have done in the first instance. We do not understand that the law had any such operation as that at all.

It will be remembered that the power of assessing that was conferred upon the Board of Public Works, was "to assess in such manner, as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law, and made by them, a reasonable proportion of the cost of improvement, not exceeding one-third," &c.

The difficulty with the assessments made by the Board of Public Works was that the legislative assembly of the District never passed any law providing the manner of assessment, but the Board of Public Works proceeded to assess one-third of all improvements upon adjoining lots by the front foot, not by the area, not by valuation, but by the front foot without reference to the depth of the lot or value. Of course, as there was no law to authorize it the whole system was simply illegal, and the object of this act of



Congress evidently was to legalize that mode of assessment, but not to legalize the errors or excessive charges that were committed in the process of making the assessment, because the law itself provides that upon complaint by any party of errors in the assessment or of excessive charges made by the Board of Public Works, it should be the duty of the Commissioners to revise the assessments and correct them. The act says:

"That the Commissioners of the District of Columbia be, and are hereby directed to enforce the collection, according to existing laws, of all assessments of special improvements prepared under an act of the Legislative Assembly of August tenth, eighteen hundred and seventy-one, as charges upon the property benefited by the improvements in respect to which said assessments were made; provided, that upon complaint being made to the Commissioners, within thirty days from the passage of this act, or erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessments so complained of and to correct the same."

So that if an error occurred in the making of an assessment, by and through which a charge proper to be made against one man was made against another, that error should be corrected under the terms of this act. That is one kind of error that was uniformly corrected in the revision of assessments. Now it appears that there was an error in charging against the abutting lot owners the cost of paving this space, which was exclusively devolved by the law upon the railroad company; and that was one of the very errors that it was the duty of the commissioners to correct under the act of June 19, 1878. Another question was made growing out of the mistaken construction of their powers by the Board of Public Works in the early part of the improvements. They conceived, at first, that, when they laid a pavement, which was chargeable to the railroad company, they could issue a certificate of indebtedness, or certificate of stock, as it is sometimes called, against the property of

the railroad company for the cost, and they might sell these assessments or certificates in market. Accordingly they did issue certificates and obtain money upon them from the First National Bank of New York.

Now, it is said that they are claiming in this suit to recover that identical money back again that they had already received, and that they ought not to be allowed to do it. At first glance this defence seems to be a very plausible one; yet, after all, it amounts to this, that though the defendant has not paid the debt that the law imposed upon it, yet it ought to be discharged entirely because the District has endeavored to realize money on that obligation from another quarter. The case might be likened to an action on a promissory note by a party, other than the maker, who takes up the note and holds it; the note is not extinguished as against the maker, because one goes and pays it and holds it. It depends entirely upon the intent with which it is done; whether the debt is paid and extinguished as the debt of the maker or not. He may go and voluntarily pay it, but if he does pay it with a view of holding it for himself, the maker's obligation is not discharged and the new holder has a right to sue him. That was the case decided by the Supreme Court of the United States in the case of the Freedmens' Saving and Trust Company *vs.* Dodge, 93 U. S., 379. Now, when these certificates were assigned to the First National Bank, it was not the intention of either of these parties that the obligation of the company to pay the money should be extinguished. Not at all. The District assigned that obligation to the First National Bank to be held by the latter on its own account, and clearly it did not extinguish the indebtedness of the defendant.

It is now agreed upon all hands, however, that the Board of Public Works were in error in reference to their powers, and that they had no right to issue any such certificate as was issued by them against the property of the defendant; that it gave nothing to the First National Bank; that it did not give to the bank a right of action against the de-

defendant, nor did the certificate constitute a charge upon the property of the defendant; that the District got the money of the First National Bank for nothing; that nothing was acquired by the First National Bank, and that, therefore, nothing was parted with by the District. Now, whether the First National Bank can recover that money from the District, as for money paid under a mistake or paid for a consideration that has failed, is a question that does not concern this defendant. Certainly the moral obligation exists on the part of the District to return the money to the bank, but the indebtedness of the defendant remains undischarged, and the only representative of that indebtedness is the District of Columbia. The First National Bank does not own the debt; it is still held in legal contemplation by the District, and the fact of issuing these certificates does not interfere with the right of the District to collect its debt.

It may, then, be well to state the general principles upon which this action is sustained. It is substantially an action to recover money paid, laid out and expended, by the District for the use of the defendant at its special instance and request.

The general rule, as we know, is that a past and executed consideration is not sufficient to sustain even an express promise. Therefore if I pay money for another man, without any request from him, even his promise to pay has been held insufficient for this past executed consideration. But wherever the money is paid on the request of the party benefited, the right to recover does exist. That request may be either expressed or implied. The general rule is stated in *Wait's Actions and Defences*, cited on the part of the defendant in argument. At page 449 of volume 4 of that work it is said:

"An action of assumpsit for money paid by one person for another can only be maintained when it was paid in pursuance of a request from such person, express or implied, so that either an expressed or implied promise to repay the same can be predicated thereon."

Again, on page 453:

"In order to entitle a person to recover for money paid for another, a request, express or implied, must be established, or an express promise to repay it, and it may be said that, in all cases where there is a legal obligation on the part of the person paying to pay the money, the primary obligation resting upon the person for whose benefit it was paid, the law implies a request and a consequent promise that will uphold an action to recover it back."

Now what is the relation between the District and the railroad company? In the case of *Barnes vs. The District of Columbia*, it will be remembered that the Baltimore & Potomac Railroad Company, in crossing certain streets within the limits of the city, left a dangerous excavation, down which the plaintiff fell, and he brought an action for the injuries he had sustained. The main question there was whether the acts or neglects of the Board of Public Works were chargeable to the District, but the important principle established in that case, as applicable to this case, was that the District of Columbia is responsible for the condition of its streets, and is bound to see that they are kept in good condition, and where a railroad company is authorized to construct its road in a street or avenue, the District is the company's surety for the safe condition of its streets, and cannot be absolved from obligation.

The District of Columbia—the Board of Public Works at that time—was bound for the proper paving of the streets, bound in the relation of a surety to the railroad company, on whom primarily the obligation rested. Now, in the cases which are put in the books, it is not necessary that any notice be given, or demand first made, upon the principal before the surety's right accrues to pay the debt, and then to recover the money paid on account of the principal. The very fact that the obligation has not been discharged by the principal is, in itself, sufficient to entitle the surety to pay the debt, and then reclaim the money from his principal. It is upon this ground, we think, that this defendant not having done or offered to do the work, and the District being

responsible for the condition of its streets, the District should proceed at once to do the work as surety, and then claim the money from the defendant, who is primarily responsible for the condition of the street, upon the implied promise to refund the money.

We recognize the rule which was recognized by the court at Special Term, that if the company chose to do the work they might do it, and they might have enjoined the District authorities from interfering with them, but if they fail to offer to do it, fail to notify the District authorities, then there was that condition of things which would authorize the District to do the work at its own immediate expense, but at the ultimate cost of the defendant, and to reclaim the money from the latter.

There is still another ground to be noticed in this connection. The second prayer granted by the court below was:

"The jury is instructed that, in determining whether the defendant company had notice or knowledge that the municipal authorities had directed and ordered that new pavements should be laid on the said streets and avenues, and had entered upon the performance of the said work, they are authorized to consider the testimony, to the effect that the defendant changed the grades of its track so as to conform to the grades of the new pavement; that its cars were running along the said streets and avenues while the work was progressing; and that the defendant obtained an injunction to prevent the paving of the spaces between its tracks, while the rest of the streets and avenues were being paved, with the other testimony in the case."

Now the facts developed in this regard were, that while the District was asserting its right and duty in paving the streets in the first instance at the cost of the defendant, the defendant came into court and objected to the District's paving between its rails, but made no objection to its paving on the outside of the rails. In other words, it tacitly consented to the right claimed by the District to pave this part of the street at the expense of the company, and this would

bring the case within the rule elsewhere laid down in *Wait*, p. 453, as follows:

"Thus, where one pays money to satisfy a debt of a person, at his request, from such request the law would imply a promise to repay it." *Cook vs. Linn*, 19 N. J. Law, 11; *Mills vs. Johnston*, 23 Tex., 308.

"And this would be the case where there is no express request, but a tacit assent to such payment, as where A pays money for B when B is present, to which he does not object, unless the circumstances are such as to indicate that it was gratuitous, the law from such tacit assent will treat the money as having been paid at B's request." *Packard vs. Lienoir*, 12 Moss, 11.

It has been claimed that this was money paid under a mistake of law, and the general rule has been insisted upon that money paid under a mistake of law cannot be recovered back. According to the view we have taken there was no mistake of law, as the District had a right to do the work and charge it to the defendant. The general rule as to money paid under a mistake of law has no application to this case. That rule is, that if I pay money under the mistaken impression that it is my duty to pay it—that it is my debt—and I discover afterwards that I was not bound to do it, I could not recover the amount so paid from the party to whom paid. Accordingly, if the District authorities had paid this money to a contractor for work that the District was not bound to do, it could not recover the money from the contractor. But if the District could not recover it from the defendant in this case, it would not be upon the ground that it was paid under a mistake of law, but because it was paid by the District without any previous request of the defendant, express or implied. But, independently of that, it is doubtful how far such a rule could have application to public officers. If a public officer undertakes to pay the public money under the mistaken impression that it was his duty to do it, it would not relieve the person really owing it from the obligation to pay it.

These are the general principles that we understand gov-

ern this case. The plaintiff asked ten different instructions and the defendant asked twenty-one; there were thirty-one instructions asked for altogether. These were all rejected by the court, save two granted at the instance of the plaintiff, and the court gave some of its own motion. We do not propose to examine these instructions in detail. It is sufficient to say that we have looked over them, and we have come to the conclusion that the judge's rulings were in conformity with the law, as we have defined it, and the judgment is therefore affirmed.

In the case of the District against the Metropolitan Railroad Company precisely the same questions arose, with an additional one.

In the case of the Washington & Georgetown Company, the District only had occasion to pave the spaces outside of the exterior rails two feet, but in the case of the Metropolitan Railroad Company, the District did the whole work between the rails and two feet outside of the exterior rails, and seeks therefore to recover the whole of that.

The evidence as to the work and the knowledge upon the part of the defendant is substantially the same in both cases. The correspondence which is in the record shows that the officers of the company were fully advised of the progress of the work and it is not necessary to go over that. I will simply refer to one item on page 82 of the record:

"That at the commencement of the work on the line of the defendant's railroad, then constructed and laid, the right was claimed by the defendant when the pavement in the spaces aforesaid laid by the defendant, had been taken up on account of a change in grade to relay the said pavement, which right was denied and refused by the said Board; and that the said Board in awarding the contracts for all pavements to be laid on the line of the defendant's railroad declared and defined its policy and determination that it would, itself, lay the said pavements over the entire roadway, from curb to curb, and with such material as the said Board had selected, and that neither in the laying of said

pavement, nor in the selection of the material to be used, did the defendant take part.

“The defendant further gave evidence tending to prove that it never received any request or demand on behalf of the plaintiff, or the said Board, nor had any opportunity afforded to do any part of the work mentioned in the declaration, nor did the said defendant offer to do any of the work sued for.”

The company were perfectly well apprised of the fact that the Board claimed the right to do this work and denied their right to do it. The defendant asserted its right to do it provisionally, but not in any legal proceeding that they might have taken. They said that they were deprived of the opportunity to do it, not that they offered to do it. They appear to have stood still and quietly acquiesced in the doing of the work by the District. The same principles of law apply to this case as the other. There was one additional feature, however, in this case.

A part of the road of this company was authorized to be run through certain streets where they had not commenced to lay their tracks at the time the board proceeded to lay the pavements that they had selected for the different streets. The president of the company entered into correspondence with the Board of Public Works, the most important part of which is found on page 78 of the record where it appears that Mr. Thompson wrote to the Board of Public Works in these words:

“Your board having recently ordered the paving of certain streets through which Congress had given this company permission to lay rails whereon to run street cars, we would respectfully ask the privilege to lay down the sleepers and cross-ties as the paving progresses, thereby preserving the streets and avenues from being cut up at a future day in the execution of this work. It is the intention of this company to extend the Metropolitan railroad westward from its present terminus to Georgetown and eastward to Uniontown, and also lay tracks on Ninth street from Pennsylvania avenue to the Boundary, and in Four-and-a-half street



from the City Hall to the Arsenal gate, as soon as the property holders along these lines subscribe to additional stock, which, it is hoped, will be done shortly. The company are willing, with the permission of the board, to go on at once and lay the timbers for these lines, fully preparing them for the rails to be put in at some future time. To keep a well laid pavement in good order it is desirable to avoid all excavation, particularly in the center of the street. This consideration doubtless influenced your board in the wise precaution of ordering all water, gas and service pipes to be laid prior to the paving. The necessity is more apparent, where railroad privileges have been granted, to have the timbers laid as the paving progresses which will not only be a benefit to the city but add to the comfort of those residing upon or passing over the street. We are willing to anticipate the putting down of the sleepers and cross-ties of our contemplated extensions, provided the paving be done by your own contractor without charge against us, and should be pleased if the suggestion herein submitted should meet the favor of your board."

The District went on and laid the pavements of these streets, and at the same time the company laid its stringers and cross-ties and prepared them for adaptation to the uses of the road at some future time; and it is now claimed that they ought not to be charged for that part of the pavement laid between the rails of this road and the two feet outside. Whenever the company undertook to lay down its railroad where there was no pavement, it is very clear that the obligation to keep the streets well paved involved the obligation to construct pavements anew. If the charter had authorized it to lay its road on a street already paved, and that pavement could be utilized so that the road could be laid down without destroying it, I suppose the obligation of the company would have been satisfied if it kept the existing pavement in good condition, and it would not be bound to pay the District for a pavement constructed before the road was even chartered. This case covers these two supposed cases. It is a case where the street was not

paved at all when the charter was given, but where the company had elected before the pavement was laid down to extend its road into the street.

Now there was offered in evidence an act of Congress under date of March 3, 1869, under which the company claimed that it had five years from that date within which to complete its road. However that may be, the company, as we have seen, addressed a letter to the Board of Public Works, which has already been referred to, by which they proposed to have the same benefit of the pavement that the board should lay down as if they had constructed their road simultaneously with the pavement, but they claimed at the same time not to be charged—not to be burdened with the same charge that the law would impose upon them under such circumstances. For that purpose they proposed to divide up the process of constructing their road so that a part of it would post date the completion of the pavement and then claim that they did not occupy the street with their road until after the pavement had been made.

Now, it seems to us that, as this company had elected to construct their road in the street, and have the use of the pavement which the board was laying down, and complete their road after the pavement was completed, that this process of constructing their road was to be treated as one thing; that they could not divide it up so as to get the benefit of the pavement that the board was laying, and yet avoid the charge that the law imposed upon them when they constructed their road simultaneously with the work done by the board, and that when they did use and occupy the street for the purpose of their railroad, they should reimburse the board for the paving that was done for their benefit; that when Mr. Thompson said that they were willing to lay their stringers and cross-ties, "provided the paving be done without charge to us," he should have said, "provided, that when the road is completed, and when we occupy the street hereafter, we will reimburse you for the work you are now doing."

There is, in our judgment, no error in the case, and I will

make the same remark about this case as I did about the other, that there is a great number of instructions which are substantially the same in the two cases. We think the judgment in this case should also be affirmed.

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## STATE OF MISSISSIPPI

*vs.*

M. J. DURHAM, First Comptroller U. S. Treasury.

AT CHAMBERS.

{ Decided August 7, 1885.  
Mr Justice MERRICK sitting.

1. When there is no jurisdiction it does not belong to the proper functions of a court to give an opinion upon a matter submitted for the guidance of parties or tribunals, even when the parties consent and invite such an opinion.
2. Mandamus will not lie against an officer of the Treasury Department who refuses to allow and pay a claim against the United States; for however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States.

Petition for mandamus.

THE CASE is stated in the opinion.

M. F. MORRIS and VAN H. MANNING for plaintiff.

Mr. Justice MERRICK delivered the opinion of the court.

This is an application on behalf of the State of Mississippi to compel the First Comptroller to take the necessary steps towards issuing a warrant for payment to the State of \$5,308.50, which sum is admitted to be due and payable from the Treasury under the acts of March, 1817 (3 Stat., 349, and of September, 1841, 5 Stat., 457, unless the general Government be entitled to set off against that demand \$413,084.66, being the part of the direct tax of twenty millions which was apportioned to the State of Mississippi by the 8th section of the act of 1861, lib. 45, 12 Stat., 294, as the part of said tax apportionable to the people of that

State by virtue of the terms of the Constitution which determines the quantum of any direct tax which is to be borne by the people within each State respectively. The comptroller admits in his return to the rule to show cause, and still more emphatically in his official opinion upon the claim, filed on the 4th of June, 1885, a copy of which he has submitted here as his argument on the present application. He declares that, according to his opinion, the State is in no manner indebted to the United States in any amount for direct taxes or otherwise, but he maintains in that opinion and by his return to the rule to show cause, that he is, nevertheless, bound to shut his eyes to his clear convictions, that the act of 1861 could not, constitutionally, and did not create and was never designed to create a debt against the States themselves by the imposition of the tax; because a certain auditor, on the 15th of May, 1868, made a certificate that he had examined and adjusted an account and found the precise sum mentioned in the 8th section of the act of 1861 (\$413,084.66) to be due by virtue of said act, and thereupon the then comptroller, on the 29th of May, 1868, certified to the same as due and payable in said certificate of May 15. The comptroller submits for the decision of this tribunal whether he is not bound, in the consideration of the present claim for moneys falling due in 1884, under the said acts of 1817 and 1841, to regard the certificates of the auditor and comptroller of 1868 as a definite adjudication operating in every case and through all time upon the officers of the Treasury; that the State of Mississippi is a debtor to the United States for the aforesaid quota of the direct tax. If submission to its jurisdiction could authorize a judicial tribunal to decide all questions which are mooted between the powers, there would be very little difficulty in dealing with the inquiry whether, in a *subsequent case*, an accounting officer of the Treasury is bound and estopped by a previous construction of a statute by another accounting officer, and which he is convinced is erroneous, because that construction has assumed the form of an account stated, and although it be apparent that such

statement of account is based upon no evidence or any fact outside the terms of the statute itself.

When there is no jurisdiction, it does not belong to the proper functions of a court to give an opinion upon a matter submitted for the guidance of parties or tribunals even where the parties consent and invite such an opinion. The whole business of the court is confined to giving decisions to cases properly before it (Wills on Jurisdiction, sec. 13); hence I am not acquitted of the duty of first inquiring whether there be any jurisdiction upon the case made by the petitioner and return, to grant a mandamus against the comptroller, the result of which would be to compel the payment of a pure money demand against the Treasury of the United States, which the United States, through that officer, refuses to pay. This inquiry does not involve a discussion of what are ministerial as distinguished from discretionary acts of executive officers—not that other question which was adjudicated by this court in *3 Mackey*, 229 (U. S., ex rel. Hoe, *vs.* Butterworth) whether if any executive officer admits that he ought to perform a duty to a citizen which has been confided by law to his official discretion, in a matter in which the Government is not in any sense an adverse party, and he declares in his return that, in his judgment, he ought to perform the duty. That in deference to the ruling of another officer, he declines to discharge that duty, the court will enforce the execution of that duty by a mandamus. But the question here is simply whether if a claim be presented to the Treasury and rejected for reasons which, to the judicial mind, might seem utterly untenable, it is competent for a court to enforce its payment by mandamus. Section 236 of the Revised Statutes provides that “all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury. The organization of the department is so comprehensive, so thorough, so exact, it is supplied not only with skilled accountants, but special law officers, and besides has, on proper oc-

casion, the right to call in aid the opinion of the Attorney-General of the United States, that it seems fully equipped for the discharge of every fiscal duty and exigency. And, therefore, independently of general considerations of abstract policy, the Government would seem to be justified in maintaining in all its integrity the dogma that it cannot, by any form of process, base its rights of property, subjected to the arbitrament of a judicial tribunal, without its explicit consent in due form of law.

The Supreme Court of the United States has, in three several cases, been so emphatic and precise in its utterance on this point, that nothing else is appropriate to this opinion but some citation from those cases.

In *The United States vs. Guthrie*, 14 How., 303, the court says:

"The only legitimate inquiry for our determination upon the case before us is this, whether, under the organization of the Federal Government or by any known principle of law, there can be asserted a power in the circuit court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States. This is the question. The very question presented for our determination, and its simple statement, would seem to carry with it the most startling consideration, nay, its unavoidable negative, unless this should be prevented by some positive and controlling command; for it would occur *a priori* to every mind that a Treasury not fenced round and shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demand, assorted and sustained through the undefined and undefinable discretion of courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The Government, under such a regime, or rather such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Con-

stitution and laws and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the court in the enforcement of their views of private interest."

Again, in *Russell vs. Walker*, 11 How., 290, that court says:

"It is well settled, too, that no action of any kind can be sustained against the Government itself for any supposed debt unless by its consent under some special statute allowing it, which is not pretended to exist here. \* \* \* The sovereignty of the Government not only protects it against suits directly, but against judgments even for costs when it fails in prosecutions. Such being the settled principle of our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented. They could not, therefore, permit the claim to be enforced circuitously by mandamus against the Secretary of the Treasury, when it could not be directly against the United States, and when no judgment on or for it had been obtained against the United States."

In that most familiar case of *Kendall vs. U. S., ex rel. Stokes*, 12 Peters, Judge Thompson, speaking for the court, says:

"These claims now were of course upon the United States, through the Postmaster-General. The real parties to the dispute were, therefore, the relators, and the United States could not, of course, be sued or the claims be in any way enforced against the United States, without their consent obtained through an act of Congress, by which they consented to submit these claims to the solicitor of the Treasury to inquire into and determine the equity of the claims, and to make such allowance therefor as, upon a full examination of all the evidence, should seem right according to the principles of equity. And the act directs the Postmaster-General to credit the relators with whatever sum, if any, the solicitor shall decide to be due to them for or on account of any such service or contract. \* \* \* Under this law the Postmaster-General is vested with no discretion or con-

trol over the decision of the solicitor, nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of Congress, and if they thought proper to vest such power in any one, and especially as the arbitrator was an officer of the Government, it did not rest with the Postmaster-General to control Congress or the solicitor in that office. The right to the full amount of the credit, according to the report of the solicitor, having been ascertained and paid by law (a special act of Congress), the enforcement of that right falls within judicial cognizance \* \* \* The act required to be done by the Postmaster-General is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite and ministerial act about which the Postmaster-General had no discretion whatever; the law upon its face shows the existence of accounts between the relators and the Post-Office Department. No money was required to be paid and none could have been drawn out of the Treasury without farther legislative provision, if this credit should overbalance the debit against the relators. But this was a matter with which the Postmaster-General had no concern. He was not called upon to furnish the means of paying the balance if any should be found. He was required simply to give the credit."

There is no deliberate expression in any subsequent opinion of the Supreme Court which enlarges these extreme and narrow and rigid limitations of the power of courts to issue a mandamus, the effect of which would be to compel the payment of money from the Treasury. In the case of *Rusiele* it will be observed that the court says that the mandamus is, in effect, a suit against the United States. That a court must not permit the United States to be sued by a mandamus directed to one of its officers where it could not be sued directly unless by its own consent under some special statute allowing it. Now it does not require argument to manifest that a refusal by an officer of the Treasury Department whose general duty under the law is to allow and



take steps to issue a warrant for the payment of any claim, is a refusal of the claim by the United States for the time being; that a mandamus against him to compel the allowance and payment thereof, is a suit against the United States, and that it is none the less a suit against the United States because the ground or notices of refusal to allow may be obviously and notoriously without legal justification. In other words, that no error of judgment or capriciousness of conduct can destroy, for the time being the quality of agent and actor in the name and on behalf of the Government of the proper Treasury official in disallowing the claim of any State or individual for money due or alleged to be owing by the United States.

For these reasons, finding this court without jurisdiction to entertain the petition, and without authority to pass upon the validity of the objection which the comptroller interposes against the issue of a warrant in favor of the relator, it only remains to refuse the writ of mandamus as prayed, which is accordingly done.

## SAMUEL STRONG vs. THE DISTRICT OF COLUMBIA.

LAW. No. 14,576.

{ Decided October 5, 1885.  
The CHIEF JUSTICE and Justices COX, JAMES and MERRICK  
sitting.

1. Where, under a stipulation, referees return into court, with their award, all the evidence and all their findings of law and of fact, the court may set aside the award for any patent mistakes of law or of fact appearing upon the face of the proceedings; but will observe the same hesitation to disturb the findings of fact as in the case of a motion for a new trial after verdict.
2. The promises of any or all of the members of a municipal board, made by them as individuals at different times and places and without that joint official deliberation which the law requires, are not binding upon the municipality.
3. Where the payee of municipal certificates of indebtedness has delivered them to third parties endorsed in blank, it becomes the payee's duty to inform the makers of any facts on which he, the payee, might object to the redemption of the certificates in favor of the holder, and claim payment to himself. In the absence of such notice the endorsement in blank and possession by the transferee give him apparent ownership and justify the makers in making payment to him.
4. Where the items in dispute between the parties to an account in an award of referees were numerous and the evidence voluminous, and the error of law in allowing certain classes of claims permeated all the accounts, *Held*, that even if the right of the court to cut down an award and adjust the final balance were clear, yet the court would not undertake to discharge the duties of an accountant by comparing all the items of complicated transactions, and then stating the exact balance, but the entire award should be vacated.

## STATEMENT OF THE CASE.

Action at law to recover for work done during the years 1872-3, under a number of written contracts executed by the Board of Public Works of the District of Columbia, and also for work claimed to have been done outside of these contracts, but arising therefrom, which work was performed under written or verbal orders from members of the Board of Public Works or some of its officers.

The declaration contained substantially the common counts; the defendant pleaded a general denial and several special pleas, among which was one of payment. After issue joined and several ineffectual trials, the action was re-

ferred by a stipulation of the parties to three referees. By virtue of this stipulation the case was heard by the referees, and an award made and filed in accordance therewith in favor of the plaintiff for the sum of \$234,798.48.

From such of the findings of fact by the referees, as are material to the case, it appears that the contracts sued on were ten in number and were all substantially the same in character, being printed forms containing blank spaces filled in with the specific terms agreed upon between the parties. A material provision of all these contracts was that partial payments in monthly instalments should be made as the work progressed. The Board of Public Works, however, in many cases failed to make these monthly payments; whereupon Strong notified them that he would be compelled to suspend the work unless this part of the contract were complied with. Certain members of the board, with the knowledge of all the others and without objection on the part of any, promised the plaintiff that if he would continue the prosecution of the work with money borrowed on his own notes, secured by pledges of certificates, issued to him by the auditor of the Board of Public Works, the board would seasonably provide money for the payment of his notes. The plaintiff thereupon borrowed on his own notes, so secured, large sums of money. When these notes matured the board failed to provide the money to meet them, and in consequence the pledgees sold the hypothecated certificates for about fifty cents on the dollar. These certificates, whenever the plaintiff found it necessary to hypothecate them, were endorsed by him or by his constituted attorneys in blank. In some instances they were sold outright by the plaintiff so endorsed. On the 20th of June, 1874, long after these certificates had passed, in the manner indicated, out of Strong's possession, Congress passed an act, 18 Stat. at L., 126, ch. 337, creating what was called a Board of Audit, which was directed to examine and audit certain suspended and floating debts of the District of Columbia and the Board of Public Works specified in the act, among which was "the debt purporting to be evidenced and ascertained by certificates of the Audi-

tor of the Board of Public Works," to which class belonged the certificates which had been issued to Strong. The 7th section of the act then authorizes the issuing of what are known as 3.65 bonds of the District and gives authority to the sinking fund commissioners "to exchange said bonds at par for like sums of any class of indebtedness in the preceding section of this act named."

A great many of the certificates which had been hypothecated or sold by Strong or by persons assuming to act as his attorneys, were thereupon presented by the holders to the Board of Audit; and the board without notice, it was claimed, to the plaintiff, issued to such holders certificates, called "certificates of the Board of Audit," for like amounts with interest, which latter certificates were subsequently taken up by the District with the 3.65 bonds, as provided for by the act of Congress. It also appears that on the 18th day of December, 1873, the plaintiff published the following advertisement in the Evening Star, a daily newspaper circulated in the District of Columbia:

*"Special Notice.*

"All persons are cautioned and notified that I have forbidden the Auditor and Treasurer of the Board of Public Works from paying certificates issued to me for work done, as certain persons holding my scrip have illegal possession of them.

"SAMUEL STRONG."

And again on the 9th of January, 1874, he published in the same newspaper the following:

*"Special Notice.*

"All persons holding my notes, bonds or evidence of debt of any description whatsoever, with collateral security for the same, in water bonds of the District of Columbia, bonds or certificates of the Board of Public Works, or any other securities as collateral for the payment thereof, are hereby notified and required to present the same without unnecessary delay to the Hon. Peter Campbell, stock broker, No.

1423 Penn. Ave., Washington, D. C., who will pay these claims on presentation and take up the securities.

"SAMUEL STRONG."

The referees here found, as matter of law, that wherever Strong had made an absolute sale or assignment of these certificates, a payment to or settlement by the District authorities with the assignees was, in the absence of proof of other facts, binding upon Strong; but if, on the other hand, the proof showed a pledge of the certificates by Strong, the payment in whole or in part by the District to the pledgee, accompanied by a transfer of the certificate to the District, would not defeat a recovery by Strong from the District of the amount called for by the certificate less the amount realized by him when he pledged it. To the latter part of this finding, as well as to numerous other findings, the defendant excepted; and the case coming on upon a motion to affirm the award, was certified by the Circuit Court to the General Term to be there heard in the first instance.

BENJAMIN F. BUTLER, WILLIAM A. COOK, FRANK T. BROWN-ING and O. D. BARRETT for plaintiff:

The provision of statute against contracts to bind the District to "the payment of money," except after and in pursuance of appropriations, is confined to "written contracts," and cannot apply to work done for the benefit of the District, at its request without such contracts or prevent the payment of the amount fairly due for such work. *Campbell vs. District of Columbia*, 2 MacA., 533; *County of Randolph vs. Poot*, 93 U. S., 513; *Hitchcock vs. Galveston*, 96 U. S., 350; *Zabriskie vs. C. C. & C. R. R. Co.*, 23 How., 398; *Marsh vs. Fulton Co.*, 10 Wall., 684; *Thomas vs. City of Richmond*, 12 Wall., 349; *Chapman vs. Douglas Co.*, 107 U. S., 355; *Ry. Co. vs. McCarthy*, 96 U. S., 258; *Bridge Co. vs. Utica*, 17 Cent. L. J., No. 12; *Manville vs. Belden Iron Co.*, *Id.*; *Kelly vs. Board Pub. Works*, 75 Va., 263; *Goddard vs. Foster*, 17 Wall., 141; 2 Kent Com., 341; *Abb. Tr. Ev.*, 39; 1 Dill. Mun. Corp., 459; 2 *Id.*, 968; *Clark vs. U. S.*, 95 U. S., 539.

Whether or not the contracts were regular, they have been ratified, and are as if originally valid. 18 Stat. at L., pt. 3, p. 116; *Strong vs. District*, 1 Mackey, 265.

Nothing can be regarded as payment except lawful money of the United States, unless plaintiff agreed to accept something in lieu thereof. 2 Greenl. Ev., secs. 516-522; *Peter vs. Beverly*, 10 Pet., 532; *The Kimball*, 3 Wall., 37; *Down vs. Hicks*, 14 How., 240.

The certificates of the Auditor of the Board of Public Works issued to the plaintiff were not a payment; they were mere statements of amounts due him, choses in action, and were not as such transferable by delivery or endorsement in blank of the plaintiff; and the possession of any of them conferred no interest or right on the holder which could, in any manner or to any extent, affect the rights of the plaintiff or deprive him of his interests in the certificates. *Cowdrey vs. Vandenburg*, 101 U. S., 572; *Colebrook, Collateral Securities*, sec. 438; *Jones, Pledges*, sec. 134; *Ballard Pavement Co. vs. Mandel*, 2 Mac A., 351.

Neither their possession nor endorsement in blank could confer on the holders any right or interest, nor any obligation on the District to pay them in the hands of any holder. *Tiernan vs. Jackson*, 5 Pet., 580.

To bind the plaintiff by the action of the Board of Audit he must not only have voluntarily appeared before it or presented his claim to it, but have continued to do so, and acquiesced in its proceedings, and afterwards accepted, in satisfaction of the submitted claims, the amounts found to be due by the board. *U. S. vs. Justice*, 14 Wall., 535; *U. S. vs. Childs*, 12 *Id.*, 232; *U. S. vs. Adams*, 7 *Id.*, 463; *Mason vs. U. S.*, 17 *Id.*, 67.

The act of June 20, 1884, ratified all oral and written contracts of the District, and rendered all pleas of *ultra vires* ineffectual. The only questions are: what and how much work was done, and materials furnished by plaintiff? What was the fair cost? Has the plaintiff been paid; if not, what balance is due him? *Strong vs. District*, 1 Mackey, 265; *Mattingly vs. District*, 97 U. S., 687; *Bissell vs. Jefferson-*

ville, 24 How., 294; Supervisors *vs.* Schenck, 5 Wall., 784; Gelpcke *vs.* Dubuque, 1 Wall., 220; Clinton *vs.* Englebrecht, 13 Wall., 446; Beloit *vs.* Morgan, 7 Wall., 623; Cooley, Const. Lim., 369-371.

FRANCIS MILLER and HENRY E. DAVIS for the District of Columbia:

Action in *assumpsit*; but *assumpsit* will not lie on an instrument purporting to be under seal of both parties, though only one seal is attached. Hatch *vs.* Crawford, 2 Port., 54; Young *vs.* Preston, 4 Cranch, 239; Wood *vs.* Edwards, 19 Johns., 205.

The District is not liable for expense incurred on private property in changing the grade. 2 Dill., Mun. Corp., secs. 543, 782-3; Smith *vs.* Washington, 20 How., 135; Taylor *vs.* St. Louis, 14 Mo., 20; St. Louis *vs.* Gurno, 12 Mo., 414.

Plaintiff cannot maintain replevin to regain possession of the certificates without tender of the amount due the transferees, nor an action against the District for the work evidenced by the certificates when he cannot pass to the District the rights of the transferees. Talty *vs.* F. T. Co., 1 Mac A., 522; 93 U. S., 324; Ballard Co. *vs.* Mandel, 2 Mac A., 351; Fullerton *vs.* Sturgess, 4 Ohio St., 529; Weirick *vs.* Mahoning Bk., 16 Ohio St., 297; McNeil *vs.* 10th Nat. Bk., 46 N. Y., 325; Savage *vs.* U. S., 92 U. S., 382.

As to duress, see Mason's Case, 17 Wall., 73, and Child's Case, 12 Wall., 243; Russell *vs.* Langstaff, Douglass, 514.

There is no right of action for recovery of the difference between the face value of auditor's certificates and the market value or value realized. Adams' Case, 17 Ct. Cls., 351; Laughlin's Case, 17 *Id.*, 376; Brown's Case, 17 *Id.*, 402; Neuchatel Co.'s Case, 17 *Id.*, 386; Morgan's Case, 19 *Id.*, 156; Looney's Case, 19 *Id.*, 230; S. C., 113 U. S., 258. See Baldwin *vs.* Ely, 9 How., 580.

Mr. Justice MERRICK delivered the opinion of the court.

These cases come before this court, in the first instance,

certified from the circuit court upon exceptions taken to the award of referees.

The reference stipulated that the referees should make separate findings of law and of fact, and should, together with their award, and as part of it, certify and return all the evidence, and all their findings of law and of fact into the circuit court.

The evidence and the findings of law and of fact are, therefore, all brought into court for revision. Now the power of a court, when all the facts and the law are brought before it on the face of the award, plainly is to review and set aside the award if it can be successfully challenged for any patent mistake of law or fact apparent upon the face of the proceedings. The court will, of course, observe the same hesitation to disturb the findings of fact upon evidence, which it would observe were there a motion for new trial after the verdict of a jury, and will not disturb such findings unless they be unsupported by evidence, or be so far opposed to the great preponderance of evidence as to leave the court free from doubt that the referees have erred in their conclusions of fact. The rules governing courts in such predicament are nowhere more clearly and concisely stated than in that admirable book, *Adams' Equity*, marginal pages 192 and 193.

Turning now to the exceptions in this case, the most important in principle and in the amount involved, are taken to the determination of the referees, that the defendant is responsible to the plaintiff for the face value, less what is shown to have been realized by him, of all the certificates of the Auditor of the Board of Public Works which were issued to him for work done, and which he hypothecated with third parties by endorsement in blank of himself or his constituted attorneys, and which were, by the holders thereof, presented to and redeemed by the Board of Audit with 3.65 bonds, issued in virtue of the act of June 20, 1874. So far as we can understand the somewhat confused findings, the referees base their conclusions in great part upon the tenth general finding of facts (p. 126, printed



award) to the effect that the Board of Public Works having failed to make monthly payments according to contract, Strong notified the defendant that he would be compelled to suspend work if the monthly payments were not made; whereupon certain members of the Board of Public Works, with the knowledge of all the others and without objection on the part of any, promised that if he would continue his work by borrowing money on his own notes, secured by pledges of auditor's certificates, the board would seasonably provide money for the payment of his notes; but they did not promise to make good all or any losses incurred from the sales of certificates at a sacrifice, in satisfaction of such pledges.

Now, assuming for the moment this finding to be accurate in point of fact, it is difficult to understand how such a promise to provide money to meet notes at maturity, or, in other words, to pay their already past due and dishonored debt at some newly designated period, could render the promisor liable in damages for not maintaining their own credit. The promise is, in substance and effect, an iteration of this existing or continuing obligation to pay an overdue debt, and nothing more nor less. But it is to be noted that the referees do not find any act or resolution of the board in their official character; and we are not aware of any authority or principle of justice, for holding that unofficial statements by any or all the members of a public body, at different times and places, made without that joint official deliberation for which the law provides, can be binding upon the municipality. There is no record of any such action or conclusion of the members of the Board of Public Works. The testimony of Magruder, the treasurer, contradicts the conclusion of the referees; and the testimony of Shepherd, the president, was not even taken upon this subject. It would be of most dangerous, not to say fatal tendency, to sanction the notion that parol testimony of witnesses, were it clear and unqualified, could be admitted at the end of ten or twelve years to establish a contract of any kind by a municipal agency required

by law to act within a very narrow range of power, and to keep a record of its public transactions. But to so loose an undertaking as the one now asserted (and which, moreover, was not within the scope of the delegated powers of the board, however formally it might have been entered into), a court could attach no efficacy. But how stands the matter in other aspects of the referee's findings, so far as the rights and obligations of the District are involved? Samuel Strong was in need of money to prosecute large contracts which he deemed valuable to himself, and which, if you please, he was much urged to consummate. He did what many other persons were doing to the extent of perhaps millions of dollars; he took the certificates of the auditor for debts due by the District, and hypothecated them with third parties, in some cases in proper person, in others through attorneys and agents by him authorized, and delivered the hypothecated certificates to his pledgees endorsed, sometimes in blank or with a printed power of attorney or assignment over the signature, and threw them thus upon the public market. Floating side by side with such certificates and with precisely similar forms of endorsement, were other like certificates which he had sold, out and out. He made no distinction in the forms of his endorsements, as a prudent man would and ought to have done, between hypothecated certificates and those he had sold absolutely. In this state of things, the act of June 20, 1874, was passed (18 Stat. at L., p. 126, ch. 337), reorganizing the whole structure of the District government. By the 6th section of that law, all and every of the claims of Samuel Strong against the District derive their efficacy, if they have any force at all. Without the vitalizing influence of that statute, as this court has already adjudged in 1 Mackey, 265, he would have no standing in court for any purpose upon the claims advanced in this controversy. All the world had constructive notice of the functions conferred upon the Board of Audit by that law; and the board was required by it to give, and did give, notice to all persons having claims against the District to present them for liquidation, and the

board was authorized to give to the claimants certificates of indebtedment for their claims, which might be presented and allowed after full investigation, which certificates were to be exchanged at par for 3.65 bonds, by a sinking fund commissioner. Now Strong knew that his auditor's certificates had been endorsed as above described and were outstanding, and might be presented to the Board of Audit for redemption, as in fact they all were presented and redeemed in 3.65 bonds.

It became, then, his duty to see to it that the Board of Audit should be in possession of any facts on which he might rely as an objection to the redemption of the certificates in favor of the possessors who, he knew, held through himself or his attorneys *prima facie* title to them. He did not do so; and not having done so, he was guilty of laches, and must be held to have allowed their payment in that manner without objection. See Adams' Case, 17 Ct. Cls., 351.

But it is said that Strong gave notices by virtue of which the District is chargeable with knowledge of the infirmity of the title of his assignees, viz., by his advertisements in the *Evening Star* of the 18th of December, 1873, and January 9, 1874, see 12th finding. And the 13th finding conveys the idea that the Board of Audit was not authorized to pay those who held Strong's hypothecated certificates without giving him notice in fact of their presentation.

In Adams' Case, 17 Ct. Cls., 351, it was shown that the plaintiff had filed a protest with the treasurer of the Board of Public Works, specifically claiming certain enumerated certificates which had been fraudulently disposed of by his pledgee; that notice was not filed with the board, and what became of it did not appear. Yet it was held that in the absence of the fact of this specific notice being brought home to the knowledge of the Board of Audit, he was concluded from claiming those certificates, they having been redeemed and paid to the holders in 3.65 bonds by the Board of Audit. In that case it having been held, first, that it

was the duty of the original owners to appear before the Board of Audit and there give notice of their claims; and, secondly, that a specific notice which had been given to the treasurer of the Board of Public Works, who was a member of that body, not brought home to the knowledge of the board was of no avail to preserve the equities of the original holder—it is vain to assert that the general notices of Strong, published in an evening paper, can signify anything. The decision in Adams' Case is adopted by the Supreme Court in Looney's Case, 113 U. S., 260. They there say that the nature and history of auditors' certificates, the so called sewer certificates and other securities of the District, as well as the legislation of Congress relating to them, have been fully stated in opinions delivered by the Court of Claims, and need not be recapitulated, and then refer by name to Fendall's Case, Adams' Case and Morgan's Case. The Court of Claims then having stated the nature of these certificates and the effect under the legislation of Congress of their redemption, and the Supreme Court having unqualifiedly approved those cases, which contain explicit statements that, by the endorsement in blank of the original holders, the possessors became clothed with an apparent ownership, which, in the absence of explicit notice of the equities of the original party, justified the Board of Audit in causing them to be extinguished by an issue of 3.65 bonds to the possessor and ostensible proprietor; and that unless the true owner did give notice in fact to the Board of Audit he was guilty of laches, and must be held to have consented to and allowed their payment in that manner. The position taken by the referees that Samuel Strong is not chargeable with the full face value of all the auditor's certificates which he ever held, and which have been liquidated with 3.65 bonds, is manifestly erroneous. But long before those cases, the Supreme Court had decided in *Cowdrey vs. Vandemburgh*, 101 U. S., 576; the principle applicable to all choses in action whether negotiable or non-negotiable in the commercial sense, to wit: that when a party makes a blank

assignment he contemplates that the blanks may be filled up, if necessary, by the holder, and that the rights of innocent parties do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance thereof. It is further to be considered that this case is not a dispute between the first owner and any assignee, but it is a dispute between the creditor and his debtor, which debtor by and through a means and apparent authority furnished to him by the creditor himself, and after a public notice warning him and all others to produce their claims, if any, before a lawful agency for liquidation, has been induced to pay the demand in full.

To allow him under such circumstances to be paid over again, would be gross injustice to an innocent public.

The errors into which the referees fell upon this question, being patent on the face of their award, permeating nearly all of the claims, and the consequence of them being an allowance of largely more than double of what the plaintiff could recover upon all his claims together, were there no mistake of law or fact in any other matter, the court would be compelled to set aside the award.

Besides this fatal defect, and making every allowance for liberty of judgment in doubtful matters to the referees, there is an eminent probability that, with respect to some large allowances to which exceptions was taken, the referees have fallen into error.

Multitudinous as are the items in dispute between the parties and voluminous as is the evidence, this court cannot undertake to discharge the duties of an accountant, comparing all the items of complicated transactions, and then striking the exact balance. Without so doing we could suggest no exact basis of settlement, even were the right of a court to cut down an award and adjust the final

balance clear, a question on which we express no opinion. Being therefore unable to indicate an exact and definite result, we are satisfied, after mature consideration, that it would not be appropriate to designate those eminently probable miscarriages to which allusion is made; possible prejudices might arise to one or other of the parties from such expression, and we are not satisfied that an identification of those questionable allowances would result in promoting any settlement of the controversy. We are the more induced to this course from the fact that, after all the investigations which have taken place, the skilled professional advisers of the parties have before them all the elements to enable them, upon a careful review of the case, to approximate at least a result which will accomplish substantial justice, and terminate, by private convention between themselves, a protracted and vexatious litigation. The court will give an order vacating and annulling the whole award.

JOHN H. SMITH vs. CATHARINE C. SMITH.

EQUITY. No. 8,839.

{ Decided October 12, 1885.

{ The CHIEF JUSTICE and Justices COX and MERRICK.

Where the cause complained of as a ground for divorce occurred in this District, and the party complained against resides here, this court has jurisdiction to grant a divorce although the petitioner is a non-resident.

## STATEMENT OF THE CASE.

Appeal from an order striking from the files a petition for divorce on the ground of the non-residence of the petitioner.

This was a proceeding for divorce, instituted by the husband, who states in his petition that he is a resident of Baltimore, Maryland, and that the defendant has been a resident of the city of Washington in this District for nearly two years. The petition alleges that the parties were married in Cincinnati, Ohio, in 1868, and lived together until 1878, when the defendant left the petitioner; that afterwards she came to the city of Washington, and there committed adultery with a certain person named. The prayer of the petitioner was for an absolute divorce. The defendant filed a motion for an order striking the petition from the files. The grounds of the motion being "Because it appeared from said petition that the petitioner is a resident of the city of Baltimore, in the State of Maryland, and therefore this court has no jurisdiction in the premises." This motion being granted, the petitioner appealed.

The Revised Statutes of the District of Columbia, sec. 740, provide as follows: "No divorce shall be granted for any cause, which shall have occurred out of the District, unless the party applying for the same shall have resided within the District for two years next preceding the application."

CAMPBELL CARRINGTON and IRVING WILLIAMSON for petitioner:

In this case, the cause of the divorce occurred within this

District, therefore section 740, R. S. D. C., does not apply.

It is well settled that, for the purpose of divorce, a wife may have a domicile separate from her husband, and the proceedings for a divorce may be instituted where the wife has her domicile. The place of marriage and of the offence, and the domicile of the husband are of no consequence. 2 Bish., Mar. & Div., 6th ed., secs. 125-9, *et seq.*; *Cheever vs. Wilson*, 9 Wall., 124; *Giels vs. Giels*, 20 Eng. L. & E., 1; *Harten vs. Harten*, 14 Pick., 181; *Calvin vs. Reed*, 5 Smith (Pa.) 375, 379.

EDWARDS & BARNARD for defendant.

Mr. Justice MERRICK delivered the opinion of the court.

The jurisdiction of this court in cases of divorce, is conferred by section 766 of the Revised Statutes of the District: "The Supreme Court shall have jurisdiction in all applications for divorce."

Sections 731 to 740, define what shall be the causes of divorce; and section 740 then qualifies the general jurisdiction in these words: "No divorce shall be granted for any cause which shall have occurred out of the District, unless the party applying for the same shall have resided within the District for two years next preceding the application." Here is a negative pregnant declaring, as strongly as an affirmative statement could, that where the cause of divorce has occurred within the District, there is jurisdiction.

According to the statement of this bill, the adultery which is complained of, the gravamen of the charge, was committed by the wife within the District of Columbia, and the husband comes here and files his bill. The court thinks that this is an appropriate place, within the provisions of the statute, for him to file it, and not only so, but that this is the most appropriate place for him to file it, for the reason that the wife coming here has assumed a domicile, and for the purposes of controversies between the wife and husband, the wife may assert, and frequently has asserted, a domicile adversary to that of the husband. For the purposes



arising out of the marriage, the benefits of the marriage, and the remedies conferred by law upon these parties, in respect of obligations arising out of the marriage, the domicile of the wife follows the domicile of the husband. But in adversary proceedings between husband and wife, it does not lie in the mouth of the wife to put her case upon the ground that this is not her domicile when she has voluntarily assumed the domicile, and has violated the matrimonial contract within it. In such a case, the assertion of the matrimonial domicile on her part should not be considered.

There are cases in the English reports, referred to in the brief, where jurisdiction has been maintained in similar cases, one being a case where there were cross-bills for divorce filed by the husband and wife who had been married in Scotland and the wife had gone to England. The wife's bill for divorce was filed in Scotland, and the husband's bill for divorce against her, was filed in England, and the English court entertained jurisdiction although the husband was domiciled in Scotland.

It seems entirely appropriate that the jurisdiction in such a case should be maintained here when the gravamen of the breach of the matrimonial contract has occurred within this jurisdiction, by the wife, and she remains within this District thereafter, for this reason: if the party against whom the divorce is sought, is not a resident within the jurisdiction where the demand is asserted, there are possibilities, which we know are often taken advantage of, of concocting testimony and of obtaining a divorce which might not have been obtained if the party charged with the wrong against the matrimonial contract, had been there to defend it. But when the bill is filed within the jurisdiction where the guilty party is, where the injury has been committed, and where all the witnesses to the transaction are to be found, it is most manifest that the purposes of justice can be best subserved by a thorough examination of all the facts at that place. The opportunity should be conferred where the cause of action originated, and where

the case can be more effectually investigated and the truth obtained, so that there may be no collusion in obtaining a divorce in favor of any party.

Another consideration is this: so far as the husband is concerned he is only interested in the jurisdiction where he lives; but the public here in the District is interested in knowing whether her *status* is fraudulently maintained. A woman who is unworthy to stand and hold herself out as a wife, and who violates the morals of the community by acting as a wife ought not to act, should not be assisted in any way by the court, and this community is interested, and has a right to know whether she is a deserving and proper member of society, and her true *status* ought to be established, and the crimes, by means of which she has forfeited any claim to consideration in an orderly and moral community, should be unmasked.

For these considerations, it seems to the court not only proper to hold that the jurisdiction here is competent, but that it is an appropriate place to exercise jurisdiction under the statute.

The decree below will be reversed, and the case remanded for further proceedings.

## WALLACE, ELLIOTT &amp; COMPANY vs. FRANCIS PROTT.

LAW. No. 25,379.

{ Decided October 12, 1885.  
The CHIEF JUSTICE and Justices JAMES and  
MERRICK sitting.

Sections 794 and 795 of Revised Statutes of the District of Columbia, which enable a debtor arrested on a *ca. sa.* to contest the creditor's right to hold him to bail, summarily, by means of a *habeas corpus* and a jury trial of issues to be framed upon the question of his right to be discharged, do not contemplate that the debtor shall be admitted to bail, between the *habeas corpus* and the trial authorized to be had on the issues framed; and a recognizance taken on bringing the defendant into court on the *habeas corpus*, conditioned for his appearance at a future day for the trial of the issues, is void against the sureties.

Appeal from a judgment of the circuit court sustaining a demurrer to a writ of *scire facias*..

THE CASE is stated in the opinion.

RIDDLE, DAVIS & PADGETT for sureties:

The recognizance purports to have been taken under sections 794-5 of the Revised Statutes of the District of Columbia, whereas those sections make no provision for a recognizance.

At common law, pending hearing on *habeas corpus*, court might admit to bail *de die in diem*, but not otherwise. Hurd on *Habeas Corpus*, 319, 320. No different provision is made by statute.

The recognizance was forced from defendant and his sureties and is void.

WM. F. MATTINGLY, ANDREW B. DUVALL, W. A. COOK and C. C. COLE for plaintiffs:

The recognizance is good as a voluntary undertaking, even if void as a recognizance of bail for want of authority in the judge to take it. U. S. *vs.* Linn, 15 Pet., 290, 314; U. S. *vs.* Hodson, 10 Wall., 395; Taylor *vs.* Taintor, 16 Wall., 371.

Prott being legally in custody under civil process, gave the undertaking to obtain immediate liberty. His release was a sufficient consideration, and on failure to appear the liability of his sureties became fixed. *Brown vs. Pierce*, 7 Wall., 215; *Baker vs. Morton*, 12 Wall., 158; *Kelsey vs. Hobby*, 16 Pet., 279.

Mr. Justice JAMES delivered the opinion of the court.

The plaintiffs having recovered judgment against the defendant Prott, sued out a writ of *capias ad satisfaciendum*, in pursuance of section 794 of the Revised Statutes of this District, which provides as follows: "If any plaintiff in a civil action, after judgment shall have been obtained by him, makes oath, according to law, that the defendant has conveyed away, lessened or disposed of his property, rights or credits, or is about to remove or has removed his property from the District, as the plaintiff believes, with intent thereby to hinder or delay the recovery or payment of his debts, the clerk of the court shall thereupon issue a *capias ad satisfaciendum*." The defendant moved in vacation to quash this writ. His motion was overruled, and thereupon he sued out a writ of *habeas corpus*, under the provisions of section 795, which is as follows: "Upon the arrest of any such defendant under a *capias ad satisfaciendum*, he may be brought by *habeas corpus* before the court, if in term time, and before one of the judges thereof in vacation, and may call upon the plaintiff to show cause why he, the defendant, shall not be discharged from imprisonment; and, upon such notice, either party may demand a trial by jury; and thereupon the court or judge shall direct an issue or issues to be framed upon the affidavit so filed, and shall cause a jury to be impanelled and sworn to try such issue or issues, and if the finding of the jury shall be for the plaintiff, the defendant shall be thereupon remanded to prison." On the return of the writ of *habeas corpus* further proceedings were had in chambers, and it appears that, on the 28th of July, 1884, the following order was made: "Said defendant appearing in court, under the writ of *habeas corpus* heretofore issued,

and calling upon the plaintiffs to show cause why he should not be discharged from imprisonment; and thereupon such cause being shown and a trial by jury being required, it is ordered and directed that issues be framed upon said affidavit upon which said writ of *ca. sa.* was issued, and that the same be tried before the jury at the ensuing term of the circuit court.

It does not appear that any issues were at that time made up; indeed, the order just recited seems to have intended that none should be made until the matter should be called for hearing at the October Term of the circuit court. The next and only other proceeding in chambers appears to have been the taking of the following instrument, which is claimed by the plaintiffs to be a recognizance, and an order of discharge until the first day of the October Term, based thereon:

"The defendant and Jeremiah Quinn and John Quinn, his sureties, acknowledge themselves indebted to the United States in the sum of \$4,000, to be levied of their and each of their lands and tenements, goods and chattels, if the defendant fail to pay the judgment herein, or in default thereof render his body in execution, or they, his sureties, fail to do so, or if the defendant fail to appear for trial under section 795 of the Revised Statutes of the District of Columbia, or if he departs the court without leave.

(Signed)

FRANCIS PROTT.

JEREMIAH QUINN.

JOHN QUINN."

Witness, L. TOBRINER.

Thereupon the following order was made:

"Francis Prott having given bail as required by the court, ordered, this 28th day of July, 1884, that he be and he is hereby discharged, until the first day of the October Term of the circuit court, from custody."

The October Term referred to began on the 20th day of October, 1884, and on that day the plaintiffs filed an affidavit that the judgment had not been paid nor in any manner satisfied, but remained wholly unpaid and unsatisfied. The record shows the following entry and order of the same date:

"It appearing to the court, by affidavit filed herein, that the defendant has failed to pay the judgment in this cause, and said defendant being called in open court and failing to appear, and Jeremiah Quinn and John Quinn, his sureties, being called in open court to produce the body of the defendant, and having failed to do so, it is considered by the court that the United States, for the use of the said Wallace, Elliott & Co., do recover against them, the said defendant and Jeremiah Quinn and John Quinn, the sum of four thousand dollars, to be released upon the payment of the judgment, interest and costs in this case. And on motion of the attorneys for the plaintiffs, the court orders that a *scire facias* be issued against the said defendant and his said sureties, to show cause why the United States, to the use of Wallace, Elliott & Co., the plaintiffs, should not have execution against them according to the force and effect of the recovery upon the forfeiture of their recognizance."

The writ of *scire facias*, issued in pursuance of this order, after reciting the *capias*, the suing out of the *habeas corpus*, and the giving of the recognizance, alleges that, "Nevertheless, said defendant has failed to pay the judgment herein, and has failed to render his body in execution, and said sureties have also failed to do so as by proceedings in said court hath been stated." This writ was returned *scire feci* as to Jeremiah Quinn and John Quinn, and *nihil* as to Prott. The sureties then moved to vacate the judgment rendered against them on the 20th of October, to set aside the forfeiture of their recognizance, upon which that judgment was based, and to quash the writ of *scire facias*. This motion was overruled, and, thereupon, they demurred to the *scire facias*, assigning the following reasons:

"1. The certain recognizance or acknowledgment by the said Francis Prott and the defendants, in the said writ alleged, is without any authority or warrant of law, and is wholly void and of non-effect.

"2. The said recognizance or acknowledgment purports to have been taken by a justice of this court, on the 28th day of July, 1884, in a certain proceeding on a writ of

*habeas corpus*; whereas the said justice had theretofore, to wit, on the 16th day of July, 1884, by his certain order remanding the said Prott to prison, exhausted his authority and jurisdiction in the premises.

"3. The appearance of the said Prott for trial, supposed to be provided for by the said recognizance or acknowledgment, was intended to be after the framing of an issue or issues, as provided by section 795 of the Revised Statutes of the United States relating to the District of Columbia; and no such issue has been framed.

"4. It does not appear that the said Prott has not appeared for trial, as in and by the said recognizance or acknowledgment provided, as is alleged, nor that he has departed the court without leave.

"5. The said recognizance or acknowledgment was improperly forfeited, and the record and proceedings in the premises are otherwise irregular and void."

The demurrer was sustained and the *scire facias* was quashed. From this judgment of the circuit court the plaintiffs have appealed, and the question presented here is, whether they should have had execution of the judgment on the recognizance. It is claimed by the sureties: first, that in a proceeding under section 795 bail could not be taken at all; second, that if bail could be taken, it was taken ineffectually in this case; and, thirdly, that if the recognizance was effectual, the writ of *scire facias* does not properly allege a breach of the conditions.

After a very careful consideration of the sections which provide for the *capias*, and for an inquiry into the truth of the allegations on which that writ is issued, we are of opinion that they do not contemplate any discharge of a judgment debtor from the actual custody under the *capias*, except as the consequence of that inquiry, and that a release on bail is actually inconsistent with their intended operation. In the first place, section 795 seems clearly to contemplate a summary proceeding, notwithstanding it permits, of course, such adjournments as the necessity of the case and the interests of justice require; and when it provides, "If

the finding of the jury shall be for the plaintiff, the defendant shall be thereupon remanded to prison," we can only construe this language as assuming that the defendant is, throughout the inquiry, in custody under the *capias*. But we rest our conclusion on broader grounds than this particular expression. It is to be observed that the legislature, having abolished imprisonment for debt, provided imprisonment of a judgment debtor for fraud, in case of an impending or accomplished removal of his property beyond the reach of those means of satisfying the judgment which still remained to the judgment creditor. It is to be further observed that this imprisonment is provided, not as a punishment of the fraud, inasmuch as the defendant may discharge himself immediately by payment, but as a remedy to defeat its operation, by holding him until he is ready to undo it by satisfaction of the judgment which he sought to defeat. In a word, it was provided as a protection of the process of the law against frauds intended to defeat that process. Now this view of the *capias* suggests two considerations. If the case made by the affidavit of the judgment creditor is, in the beginning, sufficient ground for the application of this remedy of holding the debtor in actual custody, it must be supposed that the same affidavit, on the truth of which the issue is framed, continues to be sufficient ground for holding him until the question of fact is determined, and that, therefore, the statute does not contemplate that the judgment debtor shall be relieved from the original measure of coercion while the demanded inquiry is going on, and merely because it is prolonged. The other consideration is, that when the legislature has provided this one means of protecting judgment and execution against defeat by fraud, it cannot be implied that the legislature at the same time authorizes the court, or a judge in vacation, to substitute, in the course of the very proceedings for determining whether there is ground in fact for enforcing this means, what might, in its operation, be nothing more than security for the payment of the judgment, while he finally accomplishes his fraud and escapes the coercion to undo it which



the statute had provided. It may be added that one of the causes for suing out a *capias ad satisfaciendum* is that the debtor is about to remove his property from the District, and that this remedy is allowed in order, among other things, to prevent him from doing so. If he may be released on bail, while an inquiry into the truth of the charge is pending, he is allowed an opportunity to consummate the very fraud, in defeat of execution, which the statute intends to prevent. We are satisfied that the statute leaves no room for the implication of any authority to take bail in these cases. After reaching this conclusion, we do not consider it important to discuss the sufficiency of the proceedings had in taking and forfeiting the recognizance, or of the *scire facias*, further than to say that, even if bail had been competent, this particular obligation was incorrectly forfeited, and that the *scire facias* fails to show a breach of all of its conditions.

The judgment of the circuit court sustaining the demurrer and quashing the writ is affirmed.

SAMUEL HILL ET AL. *vs.* THE COMMISSIONER OF PATENTS.

## PATENT APPEALS. No. 78.

{ Decided October 12, 1885.  
{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. The claim of a specific device or combination in a patent, and the omission to claim other devices or combinations, apparent on its face, are in law, a dedication to the public of that which is not claimed.
2. When such omission arose from inadvertence, accident or mistake, the appropriate remedy is by re-issue; and a second patent may not be granted for the devices or combinations so omitted.

Appeal from decision of Commissioner of Patents, refusing a patent.

Letters patent No. 207,738 were granted to the appellants on September 3, 1878, which contained but a single combination claim. On March 30, 1880, they filed an application for a patent for certain matter shown and described, but not claimed, in said letters patent, and embracing the claims involved in this appeal. On November 10, 1880, they filed an application for a re-issue of said letters patent, embracing substantially the same claims. The former application was rejected under rule 91 of the Rules of Practice of the Patent Office, which provides that matter shown and described, but by mistake not claimed in a patent, may be claimed by the patentee in a re-issue of the patent, but not in a separate patent. On April 26, 1883, said rejection was affirmed by the Commissioner of Patents.

WM. EDGAR SIMONDS for the appellants.

D. A. McKNIGHT for the Commissioner.

Mr. Chief Justice CARTER delivered the opinion of the court.

In the case of Samuel Hill, Benjamin B. Prentice and the Vermont Farm Machine Company, against the Commissioner of Patents, the court has unanimously concluded to affirm the decision of the Commissioner.

The case is here on appeal from the Commissioner of Patents, who has rejected the appellant's application for

patent. The patent sought is for certain devices pertaining to a milk-cooler, an ingenious contrivance by which skimmed milk can be obtained without disturbing the cream. The claims are set forth fully, and it is conceded that their subject-matter is patentable; but the ground of their rejection, and the whole issue here, is to be found in the decision of the Commissioner of Patents which says, in substance, the applicants really ask that rule 91 of the Rules of Practice may be stricken out, or so changed as to accommodate it to their and similar cases. This cannot be done. In this case it should not be done even if it could be. Applicants described the invention now sought to be patented in their former patent, but they did not claim it. By a lapse of time they are unable to re-issue that patent. They now desire to include in a patent that which they might have claimed in the former patent. This they cannot do, not only under the rules of this Office, but under the decisions of the courts.

The Commissioner then quotes the case of *Campbell vs. James*, 104 U. S., 379, decided by the Supreme Court of the United States, to the effect that a patentee cannot include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person.

It is conceded in this case that every feature of the invention sought to be patented was shown and described, but was not claimed, in a patent which had already been granted to the appellants. After that patent had been issued to them, and when they had unduly delayed in applying for a re-issue of it, which would have been the appropriate process to perfect it, they applied to the Patent Office to grant them a new patent for these devices. The Commissioner has refused it, and this court is asked to reverse that decision.

It is unnecessary to consider all the cases decided in the Supreme Court of the United States bearing on this question, and which have been cited and discussed by counsel,

for their doctrine is well summed up in the case of *Miller vs. Brass Co.*, as reported in 104 U. S., 350, in which the court say: "But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed." And in the same opinion, on page 352, they use this language: "This legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident or mistake, without any fraudulent or deceptive intention on his part; and this should be done with all due diligence and speed."

The same doctrine is reiterated and applied in the case of *Campbell vs. James*, *supra*. In that case the court say: "It is hardly necessary to remark that the patentee could not include in a subsequent patent, any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well, because he might get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared."

These cases are conclusive of the issue here. That issue is not whether the invention has been abandoned by a failure for two years to apply for a patent for it, or until the statutory limitation of two years' public use had run against the appellants; but whether, by manifesting these features of their invention in their prior patent, without covering them by claims, they have dedicated them to the public.

It is the judgment of this court that they have dedicated them to the public, and we, therefore, affirm the decision of the Commissioner of Patents.

## GEORGE S. PEPPER vs. ALEXANDER R. SHEPHERD ET AL.

EQUITY. No. 7,803.

{ Decided October 19, 1885.  
The CHIEF JUSTICE and Justices JAMES and  
MERRICK sitting.

1. In a suit in equity by the beneficiary of a trust, to enforce the trust and subject the land described in the trust deeds to sale for the payment of moneys loaned by him on such security, defendants, while admitting that the debt is still due and unpaid, cannot be heard to say that it has been satisfied by a prior sale of the property to complainant under a former suit to enforce the trust, and that he is now estopped to demand a second sale of the property, and at the same time aver that such prior sale was a nullity and was so decreed on a suit brought to set aside such sale, and that, under such sale and annulment thereof by such decree, complainant took nothing. A defence which, in the same breath, asserts that complainant acquired no title under the first sale, and that, by virtue of that sale, he is estopped from selling again, is a defence which a court of equity cannot entertain.
2. Subsequently to the execution of the deeds of trust securing complainant's debt, a deed was made to trustees to secure a third person for money loaned by her to the grantor of land, including the same lot and a lot adjoining thereto, constituting such third person a senior encumbrancer of such additional lot; while by virtue of the fact that the buildings on the property in the deeds of trust made in favor of complainant extended over and were partially erected on such additional lot, constituting complainant a junior encumbrancer thereon. *Held*, that the facts, that the whole property had been held in general ownership, and that to sever the lots would be destructive of the value of both of them, constitute a case where a court of equity should order all the property to be sold together, reserving to the beneficiary of the trust deed of the adjoining lot, such portion of the proceeds of the sale as will be in proportion to the value of her interest in such additional lot.
3. Wherever property subjected to a lien has been brought within the domain of a court of equity and a receiver of that property is appointed, whatever rents and profits the receiver gets into his hands will be dedicated along with the *corpus* of the funds to the satisfaction of the lien after paying taxes, insurance and like burdens.

THE CASE is stated in the opinion.

NATHANIEL WILSON and HANNA & JOHNSTON for complainant:

Complainant's lien is paramount on all the property, and the first proceeds of sale should be applied to the discharge

of his claims. *Drury vs. Hayden*, 111 U. S., 223; *Ketchum vs. St. Louis*, 101 U. S., 306.

Where the mortgaged property is insufficient to pay (or not likely to pay, *Astor vs. Turner*, 11 Paige, 436) the debt in controversy, and the mortgagor is insolvent or out of the jurisdiction of the court, a receiver is appointed. 2 *Jones, Mort.*, §§ 1516, 1521, 1532; *Kerr, Receivers*, § 666 and cases; *Post vs. Dorr*, 4 Edw. Ch., 412, 415; *Brown vs. Chase*, Walk. Ch., 43; *Quincy vs. Cheeseman*, 4 Sandf. Ch., 405; *Hill vs. Robertson*, 24 Miss., 374; *Myers vs. Estell*, 48 Miss., 383.

In addition to the sale of the property and the condemnation of the rents in the receiver's hands, the court below granted a personal decree against the defendant, Shepherd, for the deficiency remaining, after exhausting these securities. This was not only proper but necessary, for section 808 of the Revised Statutes of the District of Columbia is peremptory and directory as to both the jurisdiction of the court and the form of the decree. *Dodge vs. F. S. & T. Co.*, 106 U. S., 445.

An estoppel can only arise when there is an identity of the cause of action, of parties, of the character in which the parties sue, and of the thing in controversy. *Strong vs. Grant*, 2 Mackey, 218.

Furthermore, estoppels must be mutual. *Den vs. Sharp*, 4 Wash. C. C., 609; *Wells, Res. Adj.*, § 199; *Walden vs. Bodley*, 14 Pet. (39 U. S.), 161; *Hughes vs. U. S.*, 4 Wall., 237.

A. C. BRADLEY, W. F. MATTINGLY and ENOCH TOTTEN for defendants:

The record shows that the complainant had made his election to take under the deeds of trust according to their description, with full knowledge of the alleged mistake; that he had indicated this election by several successive steps from 1878 down to July, 1881. These decisive acts, done with knowledge, determined his election and confine him to the course of action adopted. *Bigelow, Estop.*, 503, 514; *Rennick vs. Bank*, 8 Ohio, 529; *Rapallee vs. Stewart*,

27 N. Y., 310; *Duff vs. Wynkoop*, 74 Penn. St., 300; *Swanson vs. Tarkington*, 7 Heisk., 612; *Tuite vs. Stevens*, 98 Mass., 305.

Diligent and prompt action is required in such matters. 1 Story Eq., 10th ed., § 146 and note; *Grymes vs. Sanders*, 93 U. S., 62.

The fact that Mrs. Gray is a party to the suit does not affect the question of estoppel of the former suit as between Shepherd and his trustees and Pepper. *Thompson vs. Roberts*, 24 How., 241.

She was not a necessary party to the first suit and the decree as an adjudication of the rights of the parties to the cause, is not for that reason any less effective. Story, Eq., § 193; *Carpentier vs. Brenham*, 40 Cal., 234; *Board Supervisors vs. M. P. R. Co.*, 24 Wis., 123; *Howard vs. R. Co.*, 101 U. S., 848.

With respect to the claim for rents and profits pending this litigation, it cannot be maintained that there is any right thereto as against that portion of the property not included in the trust deeds. The right does not exist in a proceeding to enforce a vendor's lien. *Morford vs. Hamner*, 59 Tenn., 391; *Mayo vs. Fletcher*, 14 Pick., 530; *Easley vs. Tarkington*, 5 Bax., 593; *Gibson vs. Farley*, 16 Mass., 280.

The complainant or his trustees have no right under the deeds of trust to the possession of the conveyed property upon default made, and no right to the rents and profits after such default. Their rights are specifically defined and limited by the contract, and consist solely in the sale of the property and the appropriation of the proceeds to the satisfaction of the debt. *Wagar vs. Stone*, 36 Mich., 364; *Guy vs. Ide*, 6 Cal., 99; *Gilman vs. Ill., etc., Tel. Co.*, 91 U. S., 617; *R. R. Co. vs. Schutte*, 103 U. S., 143; *Kountze vs. Omaha Hotel Co.*, 107 U. S., 392-3; *Teal vs. Walker*, 111 U. S., 242.

There is also an error in rendering a personal judgment against the defendant Shepherd. Such relief is inconsistent with the apparent scope and purpose of the bill, and not being of the same general nature as the relief specifi-

cally prayed, cannot be granted under the prayer for general relief. *Jones, Mort.*, 1475, 1477; 1 *Dan. Ch. Pr.*, 378 (381); *Morrison vs. Shuster*, 1 *Mackey*, 194; *English vs. Foxall*, 2 *Pet.* (27 U. S.), 605, 612.

Mr. Justice MERRICK delivered the opinion of the court.

The facts necessary to be adverted to are these:

Shepherd gave to the complainant, Pepper, a deed of trust upon his property known as part of lot 2 in square 164, of this city, for \$35,000, and shortly after gave him an additional deed of trust upon the same property, to secure the sum of \$10,000 with interest. Afterwards Shepherd gave a deed of trust to secure to Mrs. Mercy G. Gray a certain sum of money upon the same property, including in her deed the adjacent property known and designated in the pleadings and proofs in this cause as lot A, adjoining the property which was conveyed in trust to secure Mr. Pepper.

At the time of all the encumbrances there were valuable buildings erected upon that part of lot 2 which was embraced in the deeds of trust to Pepper, and those buildings projected over and were in part built upon the lot A, which was one of the subdivisions made by Mr. Shepherd of the original divisions of the square; and not only did they project over it, but there were certain other easements connected with it, adits to the buildings, outlets, carriageways and doorways over this adjacent property, but not specifically set out in terms in the deeds of trust to Pepper.

In this state of the case, upon default having been made, Pepper proposed to sell the property under the two deeds of trust to him, but by reason of the omission or refusal of one of the trustees to concur in the sale under the provisions of the deeds of trust, he had recourse to a court of equity to remove one of the trustees and to supply his place by another.

In the progress of that suit it so happened, by inadvertence, that when the decree came to be made to substitute another trustee, there was an error in the description of the property in the decree, by leaving in the designation of the



property a blank, the result of which was that the decree was uncertain in itself and practically void on account of the uncertainty in its description of the property.

The defect escaped observation until the substituted trustees had undertaken to make a sale at which Pepper became the purchaser. After the sale Mr. Shepherd filed his bill on the equity side of the court to set it aside for various reasons alleged, as being void and being a cloud upon his title. That cause was so proceeded with that the bill was dismissed by the equity court, because, as the judge held, the sale to Pepper under the decree was utterly void. The decree being entirely uncertain as to the property, there was no effective appointment of a trustee, and there was no effective sale under the decree; the whole thing, in point of fact, was a miscarriage. Thus the bill was dismissed by the court of equity upon the ground that there was no cloud upon the title, because the sale itself was a nullity.

Thereafter Pepper, the beneficiary in the first two deeds of trust, filed the present bill, making Shepherd, the original mortgagor, and Mrs. Gray, the subsequent incumbrancer, parties, as also the trustees in a certain subsequent deed of trust which need not be referred to particularly in the matter now under consideration.

The parties came in to answer that bill; Shepherd, on his part, in his answer, as well as in the bill which he had filed for the purpose of setting aside the sale, averring that that sale was an entire nullity and that it passed no title. Mrs. Gray came in and by her answer also averred that the sale to Pepper was a nullity. Both averring the sale to be a nullity, still object that Pepper has not any right now to make a sale of the property, upon the ground that having made his sale he must abide by it. In the same breath they assert that he acquired no title under that first sale, and that, by virtue of the sale, he is estopped from selling again. That is the main question in this cause.

Now it is perfectly apparent that the defence thus made is a defence which a court of equity cannot entertain. They

claim that he is estopped by a sale, and yet, in the same breath, they say that nothing passed under that sale, and that the decree was ineffective to pass any title to the trustees under it; and they have forced Shepherd by the attitude taken in the independent bill by him and in the defences made here, to appeal for redress to the court once more.

While they undertake to maintain that there is an estoppel on his part, they seem to forget altogether that there was a paramount estoppel not only in law, but according to the fundamental principles of justice, to the defences which they now set up. It is impossible that they can aver in one breath that the sale was utterly void and nugatory, and in the same breath deny that he has any redress and any right to appeal to a court of equity to enforce his rights, it being admitted on all hands that his debt has not been paid, and that he has received no benefit whatsoever from the sale thus made and thus assailed.

During the progress of the argument, a case was revived in my memory, which entirely covers and overwhelms any such defence as that. I refer to the case of Philadelphia, etc., R. R. Co. *vs.* How., 13 How., 307, the decision in which was given by Judge Curtis, and the appositeness of the rule laid down there will appear when I state what were the facts in that case which affect that portion of the decision which I shall read.

Sebre Howard had brought a suit, on the law side of the Cecil County Court of the State of Maryland, against the railroad company upon a contract for an accounting and in *assumpsit*. When the case came on for trial, the railroad company defended the case upon the ground that the action should not be *assumpsit*, but that the contract made between the parties was a contract under seal, and Howard's remedy, if any, was in covenant. He was dismissed from the court upon the defence thus made. He turned around and brought suit against the company in the United States court for the District of Maryland, in covenant, and when that case came on to be tried, the defendant set up the defence that it was not a covenant, that the contract was not under seal, that

he could not maintain covenant but must sue in *assumpsit*. Here was almost a perfect parallel to the pretensions made by the defendants in this case. That being the predicament of the case at the trial, this prayer was made on the part of the plaintiff (I read from page 335 of 13 Howard):

"If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant as a contract under the seal of the Wilmington & Susquehanna Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard against the last mentioned company in Cecil County Court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defence would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court."

In commenting upon the prayer and affirming it, the Supreme Court, by the mouth of Judge Curtis, uses this language at pages 336-7: "It is further objected that the facts supposed in the instruction did not amount in law to an estoppel. We think otherwise. *Hall vs. White*, 3 C. & P., 137, was *detinue* for certain deeds. The defendant wrote to the complainants' attorney and spoke of the deed as in his possession under such circumstances as ought to have led him to understand a suit would be brought upon the faith of what he said. Best, C. J., ruled: 'If the defendant said he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover, though the assertion was a fraud upon his part.' In *Doe vs. Lambly*, 2 Esp., 635, the defendant had informed the plaintiffs' agent that his tenancy commenced at Lady-day, and the agent gave a notice to quit on that day. This not being heeded, ejectment was brought, and the tenant set up a holding from a different day. But Lord Kenyon refused to allow him to show that he was even mistaken in his admission, for he was concluded. *Den vs. Oliver*, 3

Hawks, 479; *Crockett vs. Lashbrook*, 5 Mon. (Ky.), 530; *Trustees vs. Williams*, 9 Wend., 147, are to the same point. These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss and his own gain, he is guilty of fraud; a fraud in fact if he knows it to be false, fraud in law if he does not know it to be true. *Polhill vs. Walter*, 3 B. & Ad., 114; *Lobdell vs. Baker*, 1 Met., 201. Certainly it would not mitigate the fraud if the false assertion were made in a court of justice, and a meritorious suit defeated thereby. We are clearly of opinion that the defendant cannot be heard to say that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable to hold, that the representation which defeated one action on a point of form should sustain another on a like point."

That case is absolutely in point as to this: Shepherd filed his bill asserting that the sale was a nullity by reason of the defect in the decree appointing a trustee. He now comes in, and so does Mrs. Gray, asserting that that sale was absolutely void, and yet saying, because that sale was void, the party is to be stripped of all his rights, and he must stand by that inefficacious sale. If they asserted the validity of the former sale, then, of course, Pepper would be in possession, and they might say he was not entitled to any further remedy. But having asserted solemnly the invalidity of that sale, they cannot now interpose the proceedings which culminated in it as an obstacle to the complainant in his effort to obtain satisfaction of a debt which is honestly due to him. That is the principal point in this cause.

The second question in the case is made by Mrs. Gray to this effect, that inasmuch as she is the first incumbrancer on this side lot A, Mr. Pepper shall not be entitled to have the whole property sold, without first discharging her whole claim.

So far as his title to sell the whole property is concerned, it rests upon two grounds: first, that he was an equitable mortgagee as to that additional lot, and it is admitted as between him and Shepherd, that it was the design of those deeds of trust to embrace that additional lot, and if Mrs. Gray were out of the case there would be no difficulty in vindicating the absolute right of Pepper to have the entirety sold under these proceedings, which are to reform a deed and then carry out the contract thus reformed.

But Mrs. Gray says that she had no notice whatsoever of any title, equitable or otherwise, as between Shepherd and Pepper in respect to the lot A, which is a dependent lot upon the other; being, as I said, in part built upon in connection with the principal building upon the lot 2 which he, Pepper, is entitled to as first incumbrancer.

There might be, if the counsel for the plaintiff had made it so in his evidence in the cause, maintained perhaps with success on the part of Pepper, that he was entitled to have the whole of that additional lot sold because that additional lot, by the manner of the structure, is made a servient tenement to the other lot, and the servitudes are notorious and visible. Part of the building was actually erected on this additional lot and patent to the eye of everybody concerned, and the adits to it of the carriageways and doorways also were over this lot A, and he might perhaps very successfully have maintained his right to sell the building along with the easements upon this additional lot and as a necessary part and parcel of its enjoyment, subject, of course, to the fee simple right so far as it did not interfere with these manifest and apparent easements and servitudes visible to the eye of everybody who saw the property.

But it is not necessary, for the purposes of the relief prayed in this case, to consider or to decide how far, as be-

tween Pepper and Mrs. Gray, that is a servient tenement. It is apparent that the two properties have been held in a general ownership, and the nature and character of the two perhaps is sufficiently made apparent to the court by the testimony in this cause to this effect that to sever them would be destructive of the value of both of them. And although Mr. Pepper has not brought home to the knowledge of Mrs. Gray the equitable mortgage as between him and Shepherd, yet the fact of the building being upon the two lots, and the fact being apparent, and, indeed, admitted by the answer of Shepherd, that if a sale was made the whole property ought to be sold together, because it would decrease the value of both to be sold separately, constitute a case where a court of equity should order all the property to be sold together.

The objection made on the part of Mrs. Gray, that she being the senior encumbrancer upon this additional lot, the common rule should be applied in her favor, to wit: that there should be no sale of that additional lot until Pepper, the senior encumbrancer on lot 2 and the junior on the additional lot, had first redeemed her whole debt, would be utterly inequitable as applied to the facts and circumstances of this case. The property being indivisible in its nature, and being admitted to be so upon the record, and it being destructive to the interests of all parties to sell separately, the necessities of the case require and the administration of justice amongst the parties demands that it should be sold together. The court will so decree, because the rule of equity always recognized and enforced wherever it can be, that you shall so use your own as not to injure your neighbor, applies with overwhelming force to the pretensions of Mrs. Gray, that she shall hold on in order to extort (practically that is her position) from the mortgagee a redemption of her whole mortgage when she knows she is not entitled to any but a very inconsiderable portion of the encumbered premises, except in subordination to the mortgage of the other parties.

These views of the case justify this court (there might be

others added if it were necessary to go further into the matter) fully in affirming the decree of the court below which determined that the whole property should be sold, reserving to Mrs. Gray such portion of the proceeds of the sale as by the ascertainment of the auditor upon testimony as to the relative value between the two properties may be determined to be the value of her interest in said lot A. That is the utmost she is entitled to in equity, in law and in justice between man and man; which justice between man and man it is the duty of the court at all times to endeavor to carry out, unless some rule of law or arbitrary regulation or some consideration of public policy intervenes to prevent the attainment of that object. Courts of justice do not allow themselves to be trifled with in matters of that sort and do not allow the greed of parties to defeat the purposes of justice and the right and equity of matters if they can possibly prevent it.

The decree of the court below left open one matter for further consideration, which is no longer an open question in this court since the decision in the case of *Keyser vs. Hitz*. That matter is the disposition of the rents and profits of this property which have accumulated in the hands of the receiver. Since that decision, this court will hold, until reversed by some higher power, that wherever property subjected to a lien has been brought within the domain of a court of equity, and a receiver of that property is appointed, whatever rents and profits the receiver gets into his hands will be dedicated, along with the *corpus* of the fund, to the satisfaction of the lien after paying taxes, insurance and the like burdens.

The decree of the court below was, therefore, entirely right as far as it went, in directing that these rents and profits should be dedicated to the payment of insurances and taxes which had accrued and that they should be paid off out of that. The court reserved the consideration of what should be done with the residue of those rents and profits after the satisfaction of those burdens, declaring that it should await the further order of this court. In that respect

the decree will be reformed by directing that after the satisfaction of those charges, to be ascertained by the auditor, the residue of the rents and profits shall go to make up whatever deficiency there may be in the satisfaction of the *corpus* of the debt, by the proceeds of the sale of these two properties; recognizing, of course, under the circumstances, the right of Mrs. Gray to her share of the proceeds of sale according to the apportionment already indicated, but dedicating the rents and profits primarily to the satisfaction of Pepper's debt, along with the proceeds of the sale of the primary property upon which the house is built.

The testimony does not sustain the assertion that Mrs. Gray took her mortgage with an equitable or imputed knowledge of the other one. We acquit her of actual knowledge and acknowledge her right to the *corpus* of sub-lot A, but the existence of those easements in and upon it and the indivisibility of the property, make it necessary that the whole should be sold as a unit in order to save loss to all parties, and this justifies the court in sustaining the court below upon the points named, and in making the subsequent disposition of the rents and profits after the satisfaction of the intervening liens.

The counsel will prepare a decree with the modification I have indicated, and the court will sign it. The order of the court dismissing Shepherd's petition to be allowed to plead the Act of Limitations against a personal decree for the deficiency of Pepper's debt, is also affirmed.



## THE UNITED STATES vs. CARRIE B. EVANS.

{ Decided October 19, 1885.  
{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.  
LAW. No. 23,537.

The provision of United States Revised Statutes, section 1765, which forbids officers or employees of the United States, whose pay is fixed by law or regulations, from receiving additional pay, etc., applies only to cases where the regular and the extra compensations are given for the discharge of duties or rendition of services incompatible with each other.

## STATEMENT OF THE CASE.

George D. Benjamin, whilst occupying the position of superintendent or foreman in the service of the United States, under O. E. Babcock, colonel of engineers in charge of the public buildings and grounds in the city of Washington, was appointed, by the Secretary of War, disbursing agent of the United States, for disbursing the money appropriated by Congress for the construction of the east wing of the new State, War and Navy Department building; and his compensation was fixed at three-eighths of one per cent. upon all moneys disbursed. His salary as superintendent or foreman was \$2,000 a year. He executed a bond with sureties for the faithful performance of his duties as such disbursing agent, and entered upon and continued in the discharge of his duties as disbursing officer from May 21, 1875, until March 15, 1877, during which time he disbursed the sum of \$559,798.99.

During the period in which he was discharging his duties as disbursing agent, he discharged also all the duties as superintendent or foreman and was paid therefor his salary at the rate of \$2,000 a year. At the same time, in his capacity as disbursing officer, he made out vouchers in his own favor at the rate of three-eighths of one per cent. on the sums disbursed by him, which vouchers were duly approved by Col. O. E. Babcock, who was in charge of the construction of the building. For the amount of these vouchers he gave himself credit in his account with the

Government, and they were allowed by the accounting officers of the Treasury Department for a time, but were subsequently disallowed. The credit thus taken by Benjamin amounted in the aggregate to \$3,071.05.

To recover this sum, this action was instituted against Mrs. Evans, who is the administratrix of one of the sureties on Benjamin's bond. The claim of the Government was that the three-eighths of one per cent. retained by Benjamin, was "additional compensation" within the meaning of United States Revised Statutes, section 1765, and could not, therefore, be allowed him, he being, at the time he disbursed the money, in receipt of a compensation as superintendent or foreman under the engineer officer in charge of public buildings and grounds.

The case was submitted to the court below on an agreed statement of facts, substantially as above, and judgment was rendered in favor of the defendant, from which judgment the plaintiff appealed.

A. S. WORTHINGTON and RANDOLPH COYLE for the United States.

ENOCH TOTTEN for defendant.

Mr. Chief Justice CARTER delivered the opinion of the court.

If the subject before us were confined to the terms of the bond and the conduct of the parties with reference to it, it would be very difficult to imagine where an issue existed. The appointment was duly made; this bond was executed; Benjamin received all this money and paid it all out, and received three-eighths of one per cent. commission for doing it. It would be very difficult to find any delinquency in connection with the conduct of this trustee of the fund or of his sureties. It is not alleged, in point of fact, that there was any. He was employed contemporaneously with this appointment as disbursing agent of the War Department, as a superintendent of laborers on the public grounds. He discharged his duties apparently with satisfaction to his employer and received his pay; but it is urged here

that inasmuch as he did so, he ought not to receive it again as a disbursing officer; that the statute providing against duplicate compensation for labor or for salary intervenes to prevent it.

There is nothing disclosed in this declaration nor in the agreed statement of facts that intimates that these duties were incompatible with each other and must be carried on at the expense of the one or the other. There is nothing averred in the declaration or assigned in the argument that the separate duties discharged by this person were derivative one from the other, a protraction of the other, or correlative with each other; a distorting for the purposes of payment of one office into two.

It was that evil that Congress had in contemplation and provided against; and, as is said by Chief Justice Taney, if the duties are not incompatible with each other, there is no law prohibiting the duplication of duties, and upon that question we are all agreed. From the time of the decision in *Converse vs. United States*, 21 How., 470, where the question was fully examined by Chief Justice Taney, down to the last echo on that subject in the case of *Meigs vs. United States*, 19 Court of Claims, 497, that doctrine has traveled down through the courts to this hour.

We therefore affirm the decision of the court below.

For myself, I wish to give another reason which I think is perfectly unanswerable against the right of the Government to recover in this case. In this, not having deliberated with my brethren, I do not wish to be understood as giving their convictions.

This is an action brought against the administratrix of the surety upon a bond conditioned for the performance of the obligation of that bond. How is it that the surety is to be made responsible under his covenant for the performance of the obligation of this bond, that this man should not receive any money anywhere else? Is he to be held responsible because the plaintiff, through the instrumentality and agency of its superintendent of public grounds, employed this man as a laborer and paid him? The proper

answer would be: Well, if you paid him wrongly, recover it back by pursuing him. But he has performed his covenants under the bond upon which you bring your action here. He has paid out all of this money, and you agreed with this surety that under this bond he was entitled to retain three-eighths per cent. and you have no right now to ask the sureties to indemnify you for your blunders in paying him for doing work somewhere else where he ought not to be paid. The very assertion of the bond as a valid instrument, the assertion of the appointment as a valid appointment, the publication of the terms of that appointment, and especially the compensation for the disbursement of the money, ought to estop the Government from saying to the sureties, "We made a mistake in employing him elsewhere; we ought not to have paid him for that." Very well, collect it back from him. You sue these sureties upon the letter of their obligation asserting its validity. They meet you and say that he has honestly disbursed every dollar of this money and was entitled to the three-eighths per cent. by doing so under the terms of the appointment which the bond pursued and that you are estopped from denying that he was entitled to it. Where is the dollar that he received that his contract did not permit him to receive? You are pursuing a surety then on what claim? Why the claim that a man cannot receive compensation from the Government for divergent duties? Very well, collect it back, but do not collect it out of the sureties upon this bond, the covenants of which have all been kept.

To my mind, this is an unanswerable reply to any claim on the part of the Government set up against the sureties alone. It is not an action against the principal on the bond.

The judgment below, which was for the defendant, is affirmed.

THE DISTRICT OF COLUMBIA *vs.* OYSTER.

LAW. No. 26,225.

SAME *vs.* EMMERT.

LAW. No. 26,213.;

SAME *vs.* DALY.

LAW. No. 26,264.

{ Decided October 26, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

The license law of the District of Columbia provides that "produce dealers shall pay annually \$25, and every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," with this qualification, "That no additional license shall be required from produce dealers for selling meat." *Held*, That within the meaning of the statute, one who brings butter and eggs to vend in the market, is as much a produce dealer as if he were bringing only cereals or fruits, or what is ordinarily called "garden stuff;" also, that one who sells meats only is not, within the statute, a produce dealer.

Informations for selling without license.

THE CASE is stated in the opinion.

A. G. RIDDLE for plaintiff.

WILLIAM A. COOK and LEIGH ROBINSON for defendants.

Mr. Justice MERRICK delivered the opinion of the court.

I have been requested to deliver the opinion of the court in these license cases.

The cases against Oyster and Daly were cases where the information had been filed against the party as a produce dealer, the charge being that he was engaged in the sale of butter and eggs, and the question was raised whether butter and eggs constitute "produce" within the meaning of the law.

There is very little to be said with reference to that matter except to refer to what has been understood to be the common usage and practice of society and the sense in which the word "produce" has been used. The argument at the bar was, as against the information, that produce meant only those things which were the product directly of the

soil, such as cereals and fruits, as distinguished from those things which were the product of human industry, and not derived from, but directly connected with, the product of the soil.

But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the *situs* of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits.

The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and with those who are engaged in the culture of the soil. It is, in every sense of the word, a part of the farm product. It is depended upon and looked upon as one of the results and one of the means of income of the farm, and in a just sense, therefore, it may be considered produce.

The word "produce" has no definite, exact and technical meaning. It may be used in a larger or more restricted sense. But we must look to what the habits and usages of society are, and what has been the practice with regard to it, so as to give an interpretation to this word which is not a technical one under the law. And in that aspect of it the court is at no difficulty in determining that, in their judgment the words "produce dealer" as used in the license law of the District of Columbia, which says that "produce dealers shall pay \$25 annually, and every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts, shall be regarded as a produce dealer," apply to one who brings eggs and butter to vend in the market as much as to one who brings only cereals or fruits or what is ordinarily called "garden stuff."

We therefore shall remand the cases against Oyster and Daly to the police court in order that they may be proceeded with to judgment.

The case against Emmert is an information against a party for selling bacon, hams, dried meat and other meats of that sort, which are not the meat of animals slaughtered just before being sold, but are cured meats, and the question there is whether the party is liable to a license as a produce dealer.

While the clause in the law says that "Produce dealers shall pay annually \$25, and every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," it also contains this qualification, "that no additional license shall be required from produce dealers for selling meat."

That seems simply to indicate, not that the selling of meat is characteristic of a produce dealer, but that the produce dealer who gets his license as such, has the further privilege, or a sort of grace and favor extended to him, within the limited amount mentioned in the statute, because it says that he shall pay no additional license where the capital invested is less than \$1,000, showing that the idea was to make the produce dealer a privileged character to the extent of his small dealings, that he might supply the necessities of society in having at his stall not only the product of the garden and the product of the stream, as fish and fruits, but that he might also sell a limited quantity of bacon and the like, with dried beef and other things which go to make up the complement of a produce dealer's establishment, without thereby depriving himself of the character and privileges of a produce dealer.

The word meat as used in connection with the butcher's employment, is used in its very largest sense and without any restriction as to the quantity which he is privileged to sell.

The authorities do not use, in the licenses for butchers, or in the regulations about butchers, the same term as was used in the statute of the United States, "butchers' meats," which would exclude the dried meats from the occupation of the butcher; but they say that the butcher and every person whose business it is to sell meats from market stalls,

shall be regarded as a butcher. There they have defined a butcher in particular language. Any meat sold at a market stall comes within the function of a butcher and belongs to his office, and his right to sell shall be determined by the right of the butcher to sell meats.

So far as the license of the butcher is concerned, the law goes on to provide that he shall pay certain definite sums in the Western Market, the Eastern Market, in the Georgetown Market and in the Northern Market, for the occupation of his stall, but it is to be paid not as a license, but as a rent for the use and occupation of that stall. A butcher pays no license as license. He pays part of the revenues of the city as a rental for the occupation of a portion of the ground belonging to the city in these several market houses.

So far as the Central Market is concerned, there is no provision in the statute requiring him to pay any rental. That seems to be provided for by the regulations of the market itself and in the obligation of the market company to pay a certain annual stipend to the District of Columbia. The particular corporation, holding that market, is entitled to the rentals of that market, as the city owning these other markets enumerated is entitled to the rentals of the stalls of those markets. It is only in the character of rentals, and not in the character of licenses that the butcher makes any payment at all.

Finding then that the traverser Emmert deals, according to the information, only in meats, and dealing in meats of any sort, whether fresh or cured meats being defined to be the thing that characterizes the trade of a butcher as declared in the 15th paragraph of the statute, the court is constrained to say that he does not come within the characteristics of a produce dealer who has to have a license and, as there is no specific license assigned to a butcher in the Central Market, he must go acquit of this information.



## PATRICK B. DUNN vs. BRIDGET MURT ET AL.

{ Decided October 26, 1885.  
{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.  
EQUITY. No. 8,676.

Where a deceased debtor has left no personal estate, his simple contract creditor need not first put his claim into a judgment against the administrator in order to support a bill to set aside an alleged fraudulent conveyance of realty, made by the debtor during his lifetime, which the creditor seeks to subject to the satisfaction of his claim.

THE CASE is stated in the opinion.

H. T. TAGGART and FILLMORE BEALL for plaintiff:

E. H. THOMAS for defendants.

Mr. Justice MERRICK delivered the opinion of the court.

This is an appeal from the equity court overruling a demurrer to a bill in equity filed by a simple contract creditor of a deceased party, for the purpose of assailing as fraudulent a conveyance made by him in his lifetime to third parties.

The bill alleges, of course, that the conveyance was fraudulent, and also alleges that there has been no administration taken out upon the estate because there were no assets of any value justifying an administration. In that state of the case a demurrer is interposed upon the ground that there is no jurisdiction in chancery to grant such relief; the counsel for the respondent maintaining, as it is understood, that it was a necessary preliminary to have obtained a judgment upon the debt before proceedings could be taken to invalidate a deed of real estate made by a decedent. The court below overruled the demurrer and from this an appeal has been taken.

If there had been personal estate left by the decedent, then there might have been and would have been occasion to call upon the administrator and to make him a party, for the reason that the personal estate being the primary fund for the payment of the debts, the grantee of the real estate would be entitled to have such an administrator brought in, in order that he might be relieved entirely of

the burden of the debt, the personal estate being the primary fund for the payment of debts. But the allegation being that there is no personal estate, it would be a nugatory act altogether, so far as the subjection of a primary in the case of a secondary fund is concerned, to make such an one a party to the bill; and such has been the course of proceeding in the courts of chancery.

But the main objection, and the one supposed to be insurmountable, was that, although there was no personal estate, there ought to have been a judgment obtained against the administrator, if not against decedent in his lifetime.

The rule of law is otherwise and it is very clearly stated in Bump on Fraudulent Conveyances, at page 516, and the reading of that paragraph will dispense with an expansion of the reasons, because they are very fully and succinctly stated therein. That author says: "A third exception to the rule which requires a lien, is in a case where the debtor dies before a judgment is obtained against him. In such a case an action against his executor or administrator would be useless, for a judgment would not be evidence for any purpose against the grantee, and after as well as before its rendition an action against the grantee would necessarily be upon the original debt and not upon the judgment. An action against his heirs would be equally nugatory, for they are only liable to creditors to the extent, interest and right in the real estate which descends to them from the debtor. A fraudulent deed, however, binds the heirs as well as the debtor, and upon the issue of *riens per descent*, the judgment would be in their favor. A court of equity, however, is authorized by the principles which regulate its jurisdiction to interpose at whatever point in the progress of the legal remedy it may appear that the creditor is actually obstructed by the fraudulent transfer or its consequences. As there is no person at law against whom a judgment can be obtained so as to affect the property, the demand is dependent upon equity for its ascertainment and enforcement. A court of

equity will, therefore, take jurisdiction, though there is no judgment. A bill in such a case is not an application for the exercise of the auxiliary jurisdiction of the court, but is a part of its original jurisdiction in equity."

That reasoning seems to us so complete that the court can dispense with adding anything further, and therefore they will affirm the decree below and remand the case so that it may be proceeded with for the ascertainment of the facts alleged in the bill as ground for relief.

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OUTERBRIDGE HORSEY *vs.* BENJAMIN F. BEVERIDGE ET AL.

EQUITY. No. 9308.

{ Decided October 26, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. Execution may issue on a judgment of this court at any time before the expiration of twelve years from the date of the return of the last execution.
2. An agreement between the judgment creditor and the judgment debtor that the latter will withdraw all opposition or interference with an execution sale of the debtor's property, on condition that the judgment creditor will surrender certain of the debtor's notes when he, the creditor, had purchased the property at the sale, renders such sale fraudulent against the creditors of the debtor.
3. But where a subsequent partition sale of the property is had, the fraud will not impair the title of the purchaser under that sale, but the proceeds being in the hands of trustees appointed by the court, may be followed by the creditors.

STATEMENT OF THE CASE.

Benjamin F. Beveridge, by the death of his mother, became entitled to a one-third interest in a piece of real estate situated in the District of Columbia. The defendant Loughery, held an unsatisfied judgment against Beveridge, and the complainant Horsey another, but previous in date to that of Loughery. Loughery levied upon Beveridge's interest in the property and caused it to be sold by the marshal in satisfaction of his judgment. At this sale Loughery became the purchaser for \$100. Afterwards a proceeding in

partition was commenced by the tenants of the property, Loughery being made a party by reason of his purchase at the marshal's sale of Beveridge's interest. A decree of partition was had, trustees were appointed and the property sold for \$5,200. The cause was then referred to the auditor to distribute the proceeds. While the case was pending before the auditor, Horsey discovered the fact of the execution sale of Beveridge's interest to Loughery and thereupon immediately appeared in the cause by petition and resisted the distribution to Loughery of the share which, but for the execution sale, would be distributable to Beveridge's creditors. The share amounted to about \$1,500. While this matter was pending, Horsey, deeming it advisable to attack the sale directly and not in a collateral proceeding, obtained an order of court staying proceedings as to the distribution of the Beveridge-Loughery share and giving him leave to commence such proceedings, by bill in equity or otherwise, as he might be advised.

He thereupon filed this bill attacking the sale upon a number of grounds, the following of which were passed upon by the court:

1. Because the levy and sale did not take place within twelve years from the date of the entry of the judgment, nor from the date of the issuing of the last *fi. fa.* thereon.

2. That the purchase of the said property at said sale was made by Loughery for the benefit of Beveridge, and for the avowed purpose of depriving this complainant of his lien upon said property and of the fruits of his judgment, in pursuance of an agreement made before said sale, between Loughery and Beveridge, whereby Loughery was permitted by Beveridge to purchase the latter's interest at said sale and to retain the same undisturbed by Beveridge, on consideration of Loughery cancelling and surrendering to Beveridge certain of the latter's overdue promissory notes held by Loughery and amounting to \$935.

The answer to the bill denied all fraud in the sale.

Testimony was taken and the facts appear in the opinion.

FRANKLIN H. MACKAY for complainant:

The complainant contends that the life of the lien of this judgment must run from the date of the judgment. If this be so, the judgment, so far, at least, as it was a lien upon the property in question, had been dead three months and two days before the issuing of the *fi. fa.* under which the property was sold. *Mulliken vs. Duvall*, 7 Gill & J., 355; *Hazelhurst vs. Morris*, 28 Md., 67; *Hagerstown Bank vs. Thomas*, 35 Md., 515, 518; *Mitchell vs. Chestnut*, 31 Md., 525; *Johnson vs. Hines*, 61 Md., 127; *Poe Pr., tit., Scire Facias*, ch. xxv, §§ 585-590; *Id.*, tit., *Execution*, ch. xxvi, § 646; *Freem. Exns.*, § 282; *Freem. Judg.*, § 394a.

The cases of *Tenney vs. Hemenway*, 53 Ill., 97, and *Davis vs. Ehrman*, 20 Penn. St., 256, are instructive upon this point, viz., that the lien of a judgment is not kept alive by the issuing of a *fi. fa.*

If a purchaser at an auction sale, by fraudulent management or misrepresentation, prevent the attendance of others or use any influence to put down fair competition in bidding, a court of equity will interpose and set the sale aside on the ground of fraud. *Newman vs. Meek*, 1 Freem. Ch., 441; *Underwood vs. McVeigh*, 23 Gratt., 429; *Barrett vs. Bath Paper Co.*, 13 S. C., 128; *Plaster vs. Barger*, 5 Ind., 232; *Martin vs. Ranlett*, 5 Rich. L., 541; *Dutcher vs. Leake*, 44 Ill., 398; *Slater vs. Maxwell*, 73 U. S. (6 Wall.), 268; *Cocks vs. Izard*, 74 U. S. (7 Wall.), 559; *Aldrich vs. Maitland*, 4 Mich., 207; see *Plaster vs. Barger, supra* (a case of an execution sale). Creditors must have the benefit of debtor's property.

The term "vendor," at a sheriff's sale includes all whose interest it is that the property should bring its full value, and subsequent judgment creditors are such persons. *Barrett vs. Bath Paper Co.*, 13 S. C., 146.

A combination between the debtor and purchaser at a judicial sale for the benefit of the debtor, is fraudulent as to his creditors; so is every sale with intent to injure or delay the creditors, and this may be proved by circum-

stances or by the declaration of the parties. 1 Story Eq., § 295; *Jones vs. Caswell*, 3 Johns. Cas., 29.

It makes no difference whether the offer be to pay cash or to release an old indebtedness. *Gardiner vs. Morse*, 25 Me., 140.

It is never a defence to say of a particular agreement coming within the condemnation of a general rule of public policy, that it ought to be excepted therefrom because it did not have the effect which the law attributes to such a class of agreements. *Firemen's Ch. Assn. vs. Berghaus*, 13 La. An., 209.

Moral fraud is not the test. *Jones vs. P. & C. R. R. Co.*, 32 N. H., 555.

LEON TOBRINER for defendants:

The objection that the levy and sale under the *fi. fa.* did not take place within twelve years from the date of the judgment or from the issuing of the last *fi. fa.*, is settled by the opinion of the court in *Thompson vs. Beveridge*, 3 Mackey, 170.

To render a sale void because of a combination to "stifle the bidding," a trick or artifice must be resorted to. The object must be to stifle competition; to get the property at an under value; the combination must be made in contemplation of a sale. See *Barrett vs. Bath Paper Co.*, 13 S. C., 159.

Objections based upon irregularities in the proceedings of the marshal in levying the writ, cannot be raised in this suit and can only be taken advantage of in the cause in which they were committed. *Cooper vs. Harter*, 2 Ind., 253; *Swiggart vs. Harber*, 5 Ill. (4 Scam.), 371; *Reed vs. Austin*, 9 Mo., 713; *Rigg vs. Cook*, 9 Ill. (4 Gilm.), 348; *Miles vs. Knott*, 12 Gill & J., 453; *Ludlow vs. Ramsey*, 78 U. S. (11 Wall.), 587; *Cooper vs. Reynolds*, 77 U. S. (10 Wall.), 315.

Mr. Justice JAMES delivered the opinion of the court:

On the 18th of May, 1872, the plaintiff recovered judgment in this court against the defendant Beveridge for

\$388.60, with interest from August 17, 1871. On August 17, 1872, plaintiff caused a *feri facias* to be issued on this judgment, which was duly returned *nulla bona*, and again on July 14, 1884, an *alias fi. fa.* which was also returned *nulla bona*.

On December 21, 1871, Alois Meisel and others recovered judgment in this court against the same defendant for \$100, with interest from January 21, 1871. The defendant Loughery purchased this judgment some time in January or February, 1884, and on March 22, 1884, just twelve years after the issuing of the last *fi. fa.*, caused an *alias fi. fa.* to be issued.

Meantime, in May, 1883, Amanda Beveridge, mother of the defendant Beveridge, died a widow, intestate, and seized and possessed of the eastern half of lot 6 in reservation 11 in Washington, and thereupon the said defendant inherited one-third interest in the premises. Loughery caused the Meisel judgment to be levied thereon on March 24, 1884, and on May 5, 1884, a sale under this levy was made by the marshal of the District, at which Loughery became purchaser for \$100. On the next day a deed was executed to him by the marshal.

Under the rule laid down in *Thompson vs. Beveridge*, 3 Mackey, 174, it appears that both the plaintiff's judgment and the Meisel judgment had been continued in force by the issuing and return of the writ of *fi. fa.*

At the time of the sale under the Meisel judgment, there were several other prior judgments which were then liens on the premises, but those liens were allowed afterwards to expire. It appears that when Loughery bought the Meisel judgment, he held promissory notes of the defendant Beveridge to the amount of \$935. It is unnecessary to go into the details of the pleadings and proofs relating to the use made of this claim in making the judicial sale; but we are satisfied that an agreement was made between Loughery and Beveridge that the latter would withdraw all opposition or interference with the sale if Loughery would give him up these notes on making the purchase at the marshal's sale;

and we hold that the purchase by Loughery was thereby tainted by fraud against other creditors.

On the 24th of May, 1884, Loughery conveyed the undivided interest purchased by him to Leon Tobriner, in trust, to secure his note for \$325, to the defendant Zachariah Tobriner. Afterwards, on 23d June, 1884, proceedings in partition were commenced in this court by one of the heirs of Amanda Beveridge, to which Loughery and Leon and Zachariah Tobriner were made defendants. That cause proceeded to a decree for sale, in which Leon Tobriner and the defendant Blair were appointed trustees to sell, and the premises were sold for \$5,200. The cause was referred to the auditor to state the account of the trustees and a distribution of the proceeds. It was only after this that the plaintiff learned, for the first time, of the judicial sale of Beveridge's interest to Loughery, and thereupon, upon his petition, he was made party to the proceedings. It appears that the proceeds of the partition sale are in the registry of the court.

As we have already said, we hold that the arrangement between Loughery and Beveridge was in fraud of the rights of other creditors, but this fraud does not affect the title of the purchaser at the partition sale, and the property itself cannot be reached. But the proceeds of the property are still in the hands of the court, and, as against Loughery, we see no difficulty in treating them just as we should have treated the property. We shall still hold that Loughery cannot, by the arrangement concerning the notes held by him, acquire any interest beyond the judgment assigned to him and which he was seeking to satisfy.

We hold, therefore, that after payment of the amount due on this judgment and of the note secured to Zachariah Tobriner, the proceeds of the sale in the partition proceedings shall be applied to the judgment of plaintiff, and that only the balance, if any, should go to Loughery.

Decree accordingly.



FREDERICK HOUSAM *vs.* LOUISE KUNECKE ET AL.

LAW. No. 24,004.

{ Decided October 26, 1885.  
 { The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

Where the landlord lets the tenant into possession, and the tenant afterwards surrenders the property to a stranger, the latter, on ejectment brought by the landlord, can only defend by showing title in himself.

THE CASE is stated in the opinion.

FRANKLIN H. MACKEY for plaintiff :

It is a well settled rule that neither the tenant nor anyone claiming under him, or put into or admitted to possession by him, can dispute the landlord's title. *Knight vs. Smythe*, 4 M. & S., 347; *Swift vs. Gage*, 26 Vt., 224; *Smith Land. & Ten.*, 234, *n. a*; *Merryman vs. Bourne*, 9 Wall., 592.

If a person having the mere right obtains possession by contract with him who has it, he cannot be remitted to his mere right, but must hold the possession according as he received it, because it was his folly to take possession in that manner without recovering it by lawful means. *Saunders vs. Lord Annesley*, 2 Schoales & L., 103.

A defendant in ejectment, having procured the possession from the plaintiff's tenant, will not be permitted to question the plaintiff's right. *Turley vs. Rodgers*, 1 A. K. Marshall, 245; *Newman vs. Mackin*, 13 Sm. & M., 383; *Phillips vs. Rothwell*, 4 Bibb (Ky.), 33; *Jackson vs. Hardin*, 4 Johns., 210. And see *Willison vs. Watkins*, 3 Pet., 43; *Fuller vs. Sweet*, 30 Mich., 237; *Rogers vs. Pitcher*, 6 Taunt., 202; *Williams' Ex'r vs. Bartholomew*, 1 B. & P., 236; Ad. Ej., 57, *n. 2*; *Jackson vs. Davis*, 5 Cow., 123; *Same vs. Harsen*, 7 Cow., 323; Ad. Ej., 247; *Tayl. Land. & Ten.*, § 705, and cases cited.

A tenant in possession under title can make no valid attornment to anyone not in privity with that title. *Fuller vs. Sweet*, 30 Mich., 237.

The claim by the defendants that the plaintiff must

show collusion between the tenants and the party let into possession by them, is plainly untenable in view of the authorities cited. It is against the reason of the law and good faith that a landlord having put his tenant into possession, should afterwards, when by the act of the tenant he is forced to an action of ejectment, have put upon him the burden of showing collusion between the tenant and the stranger, a matter which is frequently more difficult to prove than a strict legal title.

B. F. LEIGHTON for defendants:

The case does not come within the rule estopping the tenant to impeach the title of his landlord. Behrens obtained the possession from the tenants, not in acknowledgment of their title, but claiming a better title.

Mr. Justice JAMES delivered the opinion of the court:

The plaintiff in this cause filed his declaration against the tenants in possession; but the present defendants, claiming title, were, on motion, made parties. At the trial the plaintiff failed to make out a good title by deed, but produced evidence that, being in possession and claiming title, he verbally leased the property in several parcels to Knabe and Blucher respectively, who entered under the leases, acknowledging the plaintiff as their landlord and paying to him a monthly rent. Afterwards, while they were so in possession, one Behrens obtained a tax deed for the premises, and Knabe and Blucher, on his demand, attorned to him, refusing thereafter to pay rent to the plaintiff and paying it to Behrens.

The court, after informing the jury that the plaintiff had not succeeded in proving a good title by deed, and that, if the case had stopped there, he would be out of court, further instructed them as follows:

"There is another rule of law, however, relating to landlord and tenant. That is, that when a man goes into possession of property as tenant under another, he is not allowed to dispute his landlord's title. When a man goes into

possession of property as tenant to another, he is not allowed to attorn to a stranger, to the detriment of his landlord's title, unless the stranger has a superior title. The law says, you went in under this man as a tenant, and you will have to give possession back to him or you cannot question his title. He is allowed to show that the landlord's title has become extinct since he went into possession; he cannot show that it was not good originally.

"In this case if the tenant could have shown that a valid title had been acquired under this tax title, he might have shown that fact, and those claiming under the tax title, the defendants, would have been all right. It is not shown that the tax title was valid and altered the title of the landlord under whom these tenants took possession. Now, if these tenants, Knabe and Blucher, had remained in possession, they would not have been able, if Housam had sued them to get possession, to dispute his title. All that would have been necessary for the landlord to do would have been simply to prove that they went into possession under him, and the landlord might have stopped there and have then called upon them to make their defence. If the tenant sublets to somebody else, the rule of law would be the same. Anybody claiming under the tenant would stand in his shoes and could not make any better defence against the landlord's claim than the tenant could. In this case you will observe that Behrens did not go in as a sub-tenant; that is, he did not claim under these tenants, but he went to the tenants and got them to surrender possession to him. The law appears to be that, when this is done without the consent of the landlord, the new-comer stands in the same position that the tenant does, and he cannot dispute the landlord's title; and if you believe that that was the case here, that the whole of this property was acquired by Behrens through its being delivered by the tenants of Housam to him, it is only necessary for the plaintiff to prove that."

The defendants excepted to the following portion of this instruction:

"In this case you will observe that Behrens did not go in as a sub-tenant; that is, he did not claim under these tenants, but he went to the tenants and got them to surrender possession to him. The law appears to be that, when this is done without the consent of the landlord, the new-comer stands in the same position that the tenant does, and he cannot dispute the landlord's title."

It is unnecessary, at this late day, to refer to authorities in support of the rule which forbids a tenant, or any person who steps into his place, to question the title of which the tenant availed himself in accepting possession from the lessor, but which permits him to show that that title has been put to an end and that his holding is by another and better title which has taken its place. In accordance with this rule, the court first informed the jury that if it had been shown that a valid title had been acquired under the tax deed, the defendants claiming under that title would have been all right. This would have been the case of an eviction by title paramount and a new holding under the new title. But a valid title was not shown by mere production and proof of a tax deed, and the case was therefore not one of eviction and determination of the original title by a superior title. The court pointed out, therefore, that the transaction between the tenants and Behrens was a surrender to one not having or shown to have a better title. In such cases the transaction by which the possession passes from the tenant to the new-comer, cannot be treated as an eviction at all, but stands on the footing of a contract transaction between the tenant and the party to whom he yields possession. Of course a mere contract transfer by the tenant passes only his rights and his position, unless the landlord comes in and consents that it shall operate as a surrender, also, of his, the landlord's title. With this consent, the ordinary case in which the landlord's original title has been determined since the tenancy began would arise, and the tenant or his new landlord could depend on the new tenure. Without it, the tenant and the new-comer, who does not show title in himself, will have made only an

arrangement between themselves which in no way affects the landlord.

The instruction given to the jury on both points was strictly correct, and judgment is affirmed.

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THE NORTHERN LIBERTY MARKET CO. *vs.* AUGUST STEUBNER.

LAW. No. 22,799.

SAME *vs.* JOSEPH PRATHER.

LAW. No. 23,823.

{ Decided November 9, 1885.  
{ The CHIEF JUSTICE and Justice JAMES sitting.

1. Where there is no allegation of mistake, money paid to the plaintiff upon one claim cannot be recovered by way of set-off to another and different claim.
2. It is a sufficient consideration to support an action upon a promissory note that it was given in pursuance of a compromise of a disputed claim.

STATEMENT OF THE CASE.

These cases were argued at the same time and decided together upon the following state of facts:

The plaintiff, a body corporate under the general incorporation act in force in the District of Columbia, acquired the title in fee simple to half a square of ground in the city of Washington; erected thereon a large and commodious market building, containing numerous stalls adapted to the various kinds of business usually conducted in a public market, and sold, at public auction, to various persons, the right to occupy the several stalls for a term of ninety-nine years, renewable forever, at a fixed rental per month. The act provides for incorporating "any three or more persons, who desire to form a company for the purpose of carrying on any kind of manufacturing, agricultural, mining, mechanical, insurance, mercantile, transportation or marketing business in the District," the term of corporate existence, not to exceed twenty years, but with capacity in law to purchase, hold and

convey "any real or personal estate whatever which may be necessary to enable the company to carry on its operations."

The defendant Steubner purchased stall No. 333 at the public auction above referred to and paid \$400 on account of the purchase money, but, questions having arisen as to the validity of the leases, paid no more. Subsequently to his purchase he removed from stall No. 333 to stall No. 315, with the consent of the plaintiff, under an agreement to pay rent for the latter stall at the rate of \$10 per month. The action against him was for rent accrued under this agreement. The defence was, first, a plea by way of recoupment, and secondly, a plea by way of set-off, both based upon the above payment of \$400, claiming that the consideration therefor had failed. The plaintiff, under its charter, being without capacity to lease its stalls for ninety-nine years, or for any other period whatever. The circuit court, upon proof of the facts above recited, instructed the jury to return a verdict for the defendant, to which instruction the plaintiff excepted.

The defendant Prather purchased two of the stalls at the auction sale, paid \$200 dollars in cash, and gave his notes for \$1,895.92, the residue of the purchase money. At the time of the sale the market building was subject to an encumbrance of \$100,000, but, by a consent decree passed in an equity cause between the holders of the encumbrance, the plaintiff and a number of the stall holders, it was adjudged that any sale under the encumbrance should be subject to the rights of the purchasers of stalls; and on the next day the defendant, with others similarly situated, compromised with the company upon the basis of an abatement of fifty per centum per annum or the amount of the unpaid original purchase money notes, gave new notes for the residue of said purchase money, and took from the company its receipt for the same, agreeing, upon payment thereof, to execute and deliver to him a clear and unencumbered lease of his stalls for the term of ninety-nine years from the date of purchase, renewable forever, according to the terms of the purchase. The action against Prather was a suit upon the

unpaid compromise notes. The defences relied upon were, that the plaintiff, being limited by its charter to an existence of twenty years, was without power to make a lease of ninety-nine years, renewable forever; that under the general incorporation act, under which the company was organized, the only business it was authorized to do was the carrying on of the business of marketing, and not the leasing of its stalls to others for that purpose; and that the consideration of the compromise notes was the plaintiff's undertaking to perfect the defendant's title to his term which was never done. At the trial, the plaintiff having introduced evidence tending to prove the several facts above stated, rested; whereupon the circuit court instructed the jury, upon those facts, to render a verdict for the defendant, to which instruction the plaintiff excepted.

LEIGH ROBINSON and J. J. DARLINGTON for plaintiff:

A corporation, limited in its existence to twenty years, but empowered to "purchase, hold and convey any real or personal estate whatever, which may be necessary to enable the company to carry on its operations," may make a valid lease for ninety-nine years, renewable forever. 1 Bl. Com., 678; 2 Kent Com., 227; 4 Gr. Currie's Dig., 65, sec. 25; 2 Bl. Com., 318; Nicoll *vs.* Erie R. R. Co., 12 N. Y., 121; White Water Valley Co., *vs.* Vallette, 21 How., 424; Newark *vs.* Elliott, 5 Ohio St., 113; Reynolds *vs.* Starch Co., 5 Ohio, 204; Treadwell *vs.* Salisbury, &c., Co., 7 Gray, 404; Brigham *vs.* Weiderwax, 1 N. Y., 509; Lea *vs.* Hernandez, 10 Tex., 137, &c., &c. *Omne majus in se continet minus.*

The covenant to renew runs with the land, and, therefore, does not require the continued existence of the lessor to effectuate its observance. Stat. 32, Hen. VIII, ch. 34, sec. 2; Rawle on Covenants for Title, ch. 8., p. 338, and citations. Smith's Leading Cases, vol. 1, part 1, p. 115, Spencer's Case, etc.

A purchaser of lands from an incorporated company is chargeable with notice of all the restrictions upon the power to hold and convey lands contained in its charter. Merritt *vs.* Lambert, 1 Hoff., ch. 166.

The general incorporation act provides for the creation of "market corporations;" and the business of these corporations, the court will judicially recognize, is to erect market houses, classify and dedicate their stalls to the several classes of market merchandise, and lease them to butchers and others to supply the public with such goods.

Again, the act provides for mercantile and market corporations. The latter are in addition to the former, and, obviously, were intended for a different purpose than simply buying and selling on the corporation's own account.

Finally, the general incorporation act being a public statute, and the plaintiff's certificate of incorporation a public record, the defendant is conclusively presumed to have known all the facts when he made the compromise and is bound by it. 12 Pet., 56. *The Market Co. vs. Kelley*, 113 U. S., 199, is decisive of the case.

H. O. CLAUGHTON for defendant:

The act does not authorize an incorporation for the purpose of building a market house to be leased to third parties to be used by them in carrying on their marketing business. It no more authorizes this than it authorizes a mercantile corporation to erect buildings to be leased to third parties to be used in carrying on the mercantile business of the latter.

A corporation has no power except what is given by its incorporating act, either expressly or as incidental to its existence and to its express powers. *Beatty vs. Knowles*, 4 Pet., 152; *Perrin vs. Ches. & Del. Canal Co.*, 9 How., 172; *Russell vs. Jopping*, 5 McLean, 194; *Abbott's Dig. Cor.*, vol. 1, p. 567; citing numerous authorities.

There is a difference between exercising powers wholly foreign and exercising legitimate powers to an improper extent. *Whitman Mining Co. vs. Baker*, 3 Nev., 386; *Littlewort vs. Davis*, 50 Miss., 403; *Rock River Bank vs. Sherwood*, 10 Wis., 230; *Beach vs. Fulton Bank*, 3 Wend., 573; *People vs. Ginn*, 96 N. Y.

There is a difference between incorporation by the legislature, and under a general law. See *Patterson vs. Arnold*, 45 Penn. St., 410.



Corporations cannot transfer to others their property for the purpose of carrying on the business which they themselves were incorporated for. *Thomas vs. R. R. Co.*, 101 U. S., 71.

While only the State can declare that there is no corporation, the citizen may defend against its unauthorized or void transactions. *City Fire Ins. Co. vs. Carrugi*, 41 Ga., 660.

A natural person may make a lease for ninety-nine years, with covenant for renewal, but an artificial person, whose being and succession expire in twenty years, cannot. The covenant binds the heirs of the former, and may be enforced against them; but, in the latter case, the corporation and its succession passing out of existence, the renewal is impossible.

The compromise related to the encumbrance upon the market property and had no reference to the want of power to make the lease.

Mr. Chief-Justice CARTER delivered the opinion of the court:

In the case of the Northern Liberty Market Company against Steubner, we are presented with the following state of facts as recited in the record:

“Upon the trial of this cause, the plaintiff, to maintain the issue on its part joined, gave evidence tending to prove that it was a body corporate organized under the general incorporation act of the District of Columbia; that it owned in fee (subject to a deed of trust for a part of the purchase money) the west half of square numbered five hundred and fifteen in the city of Washington and the District of Columbia; that prior to January, 1875, it erected on said ground, or part thereof, a large and commodious market building with numerous stalls, adapted to the various kinds of business usually conducted in a public market. That in January, 1875, it sold at public auction, after due notice, the right to occupy said stalls for a term of ninety-nine years, renewable forever; that the plaintiff purchased on said terms stall No. 383, and entered into possession thereof; that he paid the deposit required at the time of the sale, and there-

after paid some of the purchase money notes; that by the consent of the plaintiff he removed from said stall first purchased by him to another stall, to wit, stall No. 315; that on the first day of March, A. D. 1881, the said defendant was indebted to the plaintiff in the sum of \$112, for rent of said stall so occupied by him. It was admitted that said sum had never been paid, either in whole or in part. And thereupon the plaintiff rested.

"Whereupon the defendant having been called, testified that he purchased the first-mentioned stall, and had paid thereon the sum of \$400 on account of the notes executed by him as aforesaid; that said sum had never been returned to him by the plaintiff, and he claimed the right to set off said sum against the plaintiffs' demand to the extent of said demand. And the court sustained this view and instructed the jury to find a verdict for the defendant, to which ruling and instruction of the court the said plaintiff by its counsel then and there duly excepted."

We do not think that the facts here recited entitle the defendant to make a set off of any portion of the amount paid by him on account of the purchase of this stall. The only light that the court has on the subject is that the plaintiff "sold at public auction, after due notice, the right to occupy said stalls for a term of ninety-nine years, renewable forever; and the defendant purchased on said terms stall No. 338 and entered into possession thereof; that he paid the deposit required at the time of the sale, and thereafter paid some of the purchase money notes."

Well, what does this amount to? How can the fact that the market company sold this stall for a given price to the defendant, who paid a part of the money on it, raise a right in the defendant to set off that payment against his liability for the money due on a different stall? From the very terms of the recital here, he ought not to recover it back. He does not set forth that this money was obtained from him by fraud and deception. If he did, he could not set it off in an action of assumpsit, for the supervision of the issue of

fraud would deprive it of that reciprocation of indebtedness which enables a party to come into court and set off a reciprocal indebtedness. You have to introduce a new issue, one of a tortious character, for the purpose of establishing the foundation of the liability; and the moment you are compelled to do that, you deprive the set-off of its eligibility to oppose itself to a demand.

It does not appear that the money was paid by mistake; it is not even assumed that it was. It was paid understandingly. It was paid in consideration of the sale of a leasehold interest in a stall in the market house. There is no allegation that it was without consideration. On the contrary, so far as the record goes, there was a thoroughly legal and reasonable contract upon a sufficient consideration. From the very terms, then, of the recital in the record the defendant shows that he is not entitled to recover back this money.

It was argued, however, that the market company had no existence for the purpose of making leases of its stalls, and that even if it had an existence for that purpose, the right did not reach to the extent exercised in this case. In other words, the point was raised and strenuously insisted upon that the market company, although it owned the fee simple of the market, had no power under its charter to make a lease of its stalls for ninety-nine years, renewable forever, for the reason that its corporate existence was limited to twenty years. If that question were properly raised here we would have to determine it. Individually, I have no doubt about the power of this corporation to sell all it has in this property; to give just as large a title as it has in it—a title in fee simple. It had the power to hold that title; to make the purchase and during its existence it had the power to sell it. But that is merely my individual opinion. The court does not consider that question to be raised by the record, and therefore will not pass upon it.

In a case which was heard in the Supreme Court of the United States on appeal from this court, the case of the Northern Liberty Market Co. *vs.* Kelly, 118 U. S., 199,

this very question was referred to, but left open, the court saying that it was unnecessary to determine it in the case before it, and we think it is also unnecessary to determine it here. All that we now decide is that the defendant has not, upon his own statement, shown that he is entitled to this money. He says, upon this record, that he purchased stall No. 333, and he asks to have the purchase money paid back without showing why it should be paid back. The purchaser of any piece of property might, with the same propriety, make the same request. We are all united in the opinion that no right to set off this money has been shown in this case. The judgment is therefore reversed.

The case of the same company against Joseph Prather has also been submitted to us. A similar case—substantially on all fours with this, the suit being upon the same subject-matter and between the same parties, if not in person at least in identity with this plaintiff—was decided by the Supreme Court of the United States in the case of Kelly which I have just referred to. In that case the parties had treated, as here, in compromise, and notes had been given in pursuance of that compromise, and the court held that the compromise was a sufficient consideration for the promise to pay. Mr. Justice Gray, delivering the opinion of the court, after reciting the facts said :

“The plaintiff insists that the original notes were valid, because a corporation empowered to hold and convey real estate for the objects of its incorporation, may convey an estate in fee, or any less estate, in lands which it has purchased, and may, therefore, make a valid lease of them for any term of years, though extending beyond the limit of its corporate existence. But it is unnecessary to express a definitive opinion upon that point, because it is agreed in the case stated that the defendant gave, in compromise of the original twenty notes for \$171.05 each, the new notes for \$1,881.60. If the plaintiff had exceeded its corporate powers in making the original contract, yet it had authority

to compromise and settle all claims by or against it under that contract. *Morville vs. American Tract Society*, 123 Mass., 129. The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the new note. *Cook vs. Wright*, 1 B. & S., 559; *Tuttle vs. Tuttle*, 12 Met., 551; *Riggs vs. Hawley*, 116 Mass., 596. By the terms of the agreement of compromise the plaintiff's cause of action on the original notes was not to revive, in case of the new note not being paid at maturity, except upon the surrender of this note to the defendant. The plaintiff, not having surrendered it, but holding and suing upon it as well as upon the original notes, has not performed the condition on which the revival of the right of action of the original notes depended. It follows, that the plaintiff cannot recover in this action on the original notes for \$171.05 each, but is entitled to recover on the new note for \$1,881.60, and also, for like reasons, on the note for \$394.08, made by Cross and guaranteed by the defendant."

Now this action—the case at bar—was brought upon similar notes and none other, and I do not think that anything that I could say would emphasize the judgment of this court more than what has been said in the case which I have just read. In that case the Supreme Court of the United States decided two things in express terms which directly apply to the case at bar. One is that the original notes supplanted by the compromise cannot be sued upon, and the other is that the notes given in pursuance of the compromise can be. That decision determines this case, and ought to have quieted it before it was argued. The judgment is reversed.

THE UNITED STATES, ON THE RELATION OF LUTZARDO ANGARICA DE LA RUA, Executrix of Joaquin Garcia de Angarica.

*vs.*

THOMAS F. BAYARD, SECRETARY OF STATE OF THE UNITED STATES.

{ Decided December 7, 1885.  
} The CHIEF JUSTICE and Justice JAMES sitting.

LAW. No. 15,310.

1. The necessary ground of an application for the writ of mandamus against an executive officer of the United States is, that it shall appear that he has been charged by law with the performance of a specific official duty, to which the petitioner is entitled, and that he refuses to perform that duty.
2. The Secretary of State of the United States is charged by law to conduct the business of his department in such manner as the President shall direct, and it must therefore be presumed by the courts that the action of the Secretary, in matters connected with the business of his department, has been directed by the President.
3. Whatever may be thought of the propriety of a particular direction of the President to the Secretary in respect to the business of his department, the latter simply complies with the law in obeying that direction, and mandamus will not lie to compel him to a contrary course.
4. The agreement between the American minister at Madrid and the Spanish Minister of State, for the settlement of certain claims of citizens of the United States, concluded February 12, 1871, was not a treaty, and its terms could not modify the operation of a statute, even if they had been intended to do so.
5. However plain may be the political obligation of this Government, or of its Executive, to account to the individual citizen for moneys received from a foreign government on account of injuries done to him, and for any increment on such moneys, the right of the citizen is not of such a nature that it can be enforced by mandamus upon the Executive, nor does it seem that any judicial remedy for its enforcement exists.
6. The obligation of the Government to protect the citizen against injuries by foreign states, and to procure indemnity for him in case of such injuries, contains none of the elements of what is known to the courts as contract, nor does such indemnity, when obtained by the state for the benefit of an injured citizen, become at once the property of that citizen or property held for his use in such a legal sense that his right may be enforced by legal remedies.

7. Section 8659 of the Revised Statutes of the United States, providing for the investment of "funds held in trust by the United States," relates only to a class of trusts which cannot be interfered with or disposed of by Executive power without further legislation. This statute, therefore, has no application to an investment by the Secretary of State of portions of the awards under the Spanish Claims Commissions which were temporarily reserved and withheld from the claimants with a view to meet the expenses of the commission, unless a payment to cover these expenses should be made by Spain.
8. The Secretary of State, by a circular letter to the claimants before the Spanish Claims Commission, informed them that five per centum of the awards would be reserved *for the present* to meet the expenses of the commission until a payment to cover such expenses shall be made by Spain, and that "it is hoped that no great delay will occur in receiving the payment from Spain which will *liberate this reserve* for expenses, and the department will expect to keep this reserve invested in interest-bearing securities of the United States *to cover the delay in the distribution to the claimants.*" *Held*, That this statement meant that notwithstanding the arrangement was provisional and might end in a permanent retention of the reserve, yet, in case it should be released, the investment should stand as one made in order to cover *the loss suffered by them* from the delay in paying the balance ultimately held to be due them. While, therefore, not an "agreement" with the claimant, the effect of this Executive transaction was to establish the fund as a provisional trust for the benefit of the claimants, and the accumulation by reason of the investment could not be withheld from the use declared in this executive trust without reversing the executive decision and violating the settled practice of the Government which has been to treat a former executive action, in respect of a particular matter, as conclusive, except in cases of subsequently discovered fraud, or a plain mistake of fact or of law. Nor is a trust once established to be undone because the trustee afterwards disapproves of his own act. But it was further *held*, for the reasons stated in the foregoing notes, that this was not a trust belonging to that class with which courts of equity deal or could enforce: nevertheless these principles apply to it and should govern its administration.

Petition for a writ of mandamus against Thomas F. Bayard, Secretary of State, and heard in the General Term in the first instance.

THE CASE is stated in the opinion.

EDWARD K. JONES for relator:

1. This court has jurisdiction to grant the writ of mandamus to any executive officer of the United States to compel the performance of a ministerial duty pertaining

to his office. U. S. *vs.* Schurz, 102 U. S., 378; Kendall *vs.* U. S., 12 Peters, 526; Marbury *vs.* Madison, 1 Cranch, 127; McChemy *vs.* Silliman, 6 Wheat., 598; U. S. *vs.* Arrendoxis, 6 Peters, 729; Gains *vs.* Thompson, 7 Wall., 349.

2. It is conceded that if by this proceeding it is sought to control the discretion of the Secretary of State in the performance of his official duty, the writ of mandamus will not lie. Decatur *vs.* Paulding, 14 Peters, 497; Brashear *vs.* Mason, 6 How., 92; U. S. *vs.* Commissioner, 5 Wall., 563; U. S. *vs.* Thacher, 7 Off. Gaz. Pat. Off., 603. But no element of discretion enters into this case.

As soon as the Secretary of State receives money due from a foreign power to a private citizen the duty of paying it to the citizen at once attaches. Stubbs' Case, 10 Op. Att. Gen. U. S., 31.

3. The Secretary of State had no authority to apply the retained five per centum towards the payment of the expenses of the Commission.

The Secretary of State having invested the money withheld, the income of accretion thereof follows the principal and should be paid as an incident to the main fund. This results from a rule almost universal, and common alike to the civil law and to the common law. It is embodied in the common law maxim, "*accessorum non ducit, sed sequitur suum principale*," and in the civil law maxim, "*res accessori sequitur rem principale*." Broom's Legal Maxims (7 Am. Ed.), 496; Channell *vs.* Robotham, Yelv., 68; Coke Litt., 152 *a*, 389 *d*; Finch's Law, 23; Shep. Touch., 89; Clark *vs.* Alexander, 8 Scott N. R., 165; Hollis *vs.* Palmer, 2 Bing. N. C., 713; Florence *vs.* Drayton, 1 C. B. N. S., 584; Bective *vs.* Hodgson, 10 H. L. Cas., 665; Sullivan *vs.* Winthrop, 1 Sumner, 1; Barney *vs.* Saunders, 16 How., 543.

The application of the principle here contended for does not militate or conflict with the general rule that the Government does not pay interest on its obligations. This case does not seek the enforcement of any debt or obligation from the Government in the sense of the rule laid down.



It merely seeks the delivery of property belonging to the relator. Neither is the interest or other compensation demanded of the Government; the relator merely claims the property of her testator in the condition in which, by its own natural operation, it is now found, and without any charge whatever upon the Government.

4. The right of the relator to the fund demanded has been determined by a former head of the Department of State, and the present incumbent has no authority to overrule his decision. The Right of Review, 2 Op. Att'y-Gen., 8; Power of Sec'y of Treasury, 5 Op. Att'y-Gen., 664; Case of Western Pacific R. R. Co., 13 Op. Att'y-Gen., 378; Case of R. H. McGoon, 13 Op. Att'y-Gen., 456; U. S. *vs.* Bank of Metropolis, 15 Peters, 377.

5. The law will presume that the former Secretary of State had abundant authority to decide upon the ultimate disposition of the fund in question. This would be sufficient, independently of the Convention, because the heads of the several executive departments, besides the specific duties respectively enjoined upon them by statute, are the regular constitutional organs of the President for the general administration of the affairs of the departments over which they severally preside, and the direction of the President is presumed in all matters issuing from the competent department. Relation of the President to Departments, 7 Op. Att'y-Gen., 453; Wilcox *vs.* Jackson, 13 Peters, 498; U. S. *vs.* Eliason, 16 Peters, 291, 302.

6. The award to Mr. Angarica was not an award to the United States, and its payment was in no sense a donation or gift by the United States. Comegys *vs.* Vasse, 1 Peters, 217.

7. The learned Attorney-General says in his argument, that the convention in question has not the effect of a treaty, and is, therefore, inoperative as a law unto the Secretary of State, because not ratified by the Senate. It is true that the Convention was not ratified by the Senate in the customary way, but by actual count it has been before both the Senate and House of Representatives twelve differ-

ent times, and on every occasion has received not only the ratification of the Senate, but of the House of Representatives also, in the form of appropriations to carry it into effect. 17 Stat. at L., 66, 474; 18 *Id.*, 71, 327; 19 *Id.*, 175, 238; 20 *Id.*, 98, 274; 21 *Id.*, 140, 345; 22 *Id.*, 134, 236.

8. But independently of ratification, the Convention is binding upon the Secretary of State. It is true that the Constitution declares treaties to be the supreme law of the land, and that the term "treaties" is usually applied only to such as receive the ratification of the Senate. But the declaration of the Constitution is nothing more than an affirmation of the established rule of international law, equally applicable to special or temporary conventions, cartels, truces and capitulations which are concluded by public ministers, or by military or naval commanders, without the ratification of the sovereign authority. All these engagements bind the officers of the Government, in whose name they are made, and are as much the law of the land as treaties proper, which on account of their permanency and binding force upon the nation at large, require in some countries, including the United States, the special ratification of the executive authority. Grotius, *De Jur. Bell. et Pax*, lib. iii, cap. 22, secs. 6-8; Vattel, *Droit des Gens*, liv. ii, ch. 14, sec. 207; Heffter, *Droit International* (par Bergson), sec. 94; Lawrence's *Wheat. Int. Law* (2d ed.), 442, 459, note, 460.

9. The relator has no legal remedy or mode of redress except by mandamus. We recognize, of course, the general rule that the power of the court by the writ of mandamus will not be exerted when other adequate modes of relief are available. *U. S. vs. Bank of Alexandria*, 1 Cr. C. C., 7.

An application to Congress is not a remedy. A remedy in the sense here used is an established mode of relief in the courts of justice. No such relief can be obtained by a direct suit against the United States. *U. S. vs. Clarke*, 8 Pet., 436; *U. S. vs. McLemore*, 4 How., 286; *Hill vs. U. S.*, 9 How., 386; *Nations vs. Johnson*, 24 How., 195; *The Siren*, 7 Wall., 152; *The Davis*, 10 Wall., 15.

A suit against an officer of the United States for acts done in his official capacity is plainly in effect a suit against the United States.

The Court of Claims has no jurisdiction, because the subject matter involved grows out of an agreement with a foreign nation. Rev. Stats., sec. 1066; *Great Western Ins. Co. vs. U. S.*, 112 U. S., 193; *Alling vs. U. S.*, 114 U. S., 562.

11. The obligation to do justice is universal. It rests upon all persons natural and artificial, and if, through the abuse of official authority, money of the citizen is wrongfully obtained or withheld by color of governmental power, and without authority of law, the courts will interfere and compel restitution. *Marsh vs. Fulton Co.*, 10 Wall., 676, 684; *Louisiana vs. Wood*, 102 U. S., 294; *Miltenberger vs. Cooke*, 18 Wall., 421.

WILLIAM A. MAURY for respondent:

1. The Secretary of State is not a proper party.

This proceeding would seem to be misconceived. If the Secretary of State owes any duty to them it must be in virtue of some law. But no law creating any such duty has been shown.

Certainly the convention between Spain and the United States of the 12th of February, 1871, has no such effect, and it is nowhere suggested that the commission organized under that convention exceeded its powers by attempting to impose a duty on the Secretary of State to pay the money demanded.

The law being silent, the duty, if any such exists, must appertain to the office of President of the United States, in which resides the executive power of the United States.

Congress has purposely abstained from prescribing the duties of the Secretary of State touching the foreign affairs of the United States, and has expressly said that those duties shall be such as the President may see fit to commit to his hands. The will of Congress on this subject is declared in section 202 of the Revised Statutes of the United States.

It is the President, then, who has the exclusive authority to pay the money, if the authority resides anywhere, and it would be a vain and unjust thing to command the Secretary of State to do an act which he can only perform with the consent and authority of the President.

To grant the writ in this case would be nothing less, it is respectfully submitted, than to attempt to control and direct the President in his great functions under the treaty making power by using coercion against the Secretary of State.

2. There is no duty enforceable by suit.

No doubt the basis and the measure of the demand of the United States against Spain was the sum of the claim of its citizens for indemnity, but when those claims became the subject of a reclamation by the United States against Spain, they passed as entirely under the dominion and control of the United States as if they had never been the subject of private right. The law is stated fully this way by the Court of Claims in its well-considered judgment in the *Great Western Insurance Co. vs. The United States*, 19 Ct. Cls., 217; s. c., 112 U. S., 193.

The same doctrine is laid down with great distinctness in *Rustomjee vs. The Queen*, L. R. 1 Q. B., D., 487; s. c., L. R., 2 Q. B. D., 69.

But perhaps the most striking exemplification of the doctrine is given in *Burnand vs. Rodocanachi*, L. R., 5 C. P. D., 424; s. c., L. R., 6 Q. B. D. (C. A.), 633, and L. R. 7 Appeal Cases (H. L.), 333.

The claim urged by the relator's testator for the percentage withheld was a claim on his own government, and nothing is better established than that the United States does not pay interest or damages for withholding money. The interest claimed is the fruit of the money of the United States and not of the relator's testator.

Mr. Justice JAMES delivered the opinion of the court.

This petition sets forth substantially that, on February

12, 1871, an agreement was concluded between the American Minister at Madrid and the Minister of State of Spain, for the settlement of certain claims of citizens of the United States on account of injuries committed by the authorities of Spain in the Island of Cuba; that, in pursuance of its terms, a commission, generally known as the "Spanish-American Claims Commission," was established, and the testator, Joaquin Garcia de Angarica, filed before it a claim against the Spanish government, upon which there was duly awarded a judgment in his favor for the sum of \$748,180.00; that Spain paid to the Secretary of State of the United States, to the use of the testator, and to be applied to the satisfaction of that award, the full amount of said judgment with interest thereon, in two payments, to wit, March 27, 1877, the sum of \$404,939.62, and on October 8, 1877, the further sum of \$418,191.61, making in the aggregate \$823,131.23; that, upon the receipt of said sums, it became the lawful duty of the Secretary of State to at once pay the whole amount thereof in satisfaction of the award, but that, in making such payment, the Secretary actually withheld the sum of \$41,129.74, claiming to retain the same until such time as the Spanish government should make provision for the payment of the expenses of the arbitration, in compliance with the following clause of the convention: "The expenses of the arbitration will be defrayed by a percentage *to be added to the amount awarded*;" that such retention was wholly without authority of law, either by virtue of the agreement or of any statute or otherwise, and that the petitioner protested against it and duly demanded the payment of said sum of money, but that the said Secretary and his successors in office continued unlawfully to retain the same until the 12th day of February, 1885, when the precise sum of \$41,129.74 was paid to petitioner; but the petitioner alleges that, at the time of receiving this retained sum, the then Secretary of State caused it to be invested in bonds of the United States, with the intent of paying the interest thereon earned during the period of retention together with the principal sum, to

the person entitled to receive the principal sum, and that said Secretary notified the testator of this intention in a certain circular letter, and repeated the same in a subsequent letter to petitioner's attorneys. It is alleged that the retained five per centum of testator's award stood invested in these securities from the time of its receipt from Spain, until about the 9th day of February, 1885.

The remainder of the petition gives the history of petitioner's efforts to obtain payment to her of the interest earned on what she claims to be a fund in the hands of the Secretary of State belonging specifically to her, and of the refusal of Mr. Secretary Frelinghuysen and of Mr. Secretary Bayard to account for such interest and their reasons for so doing.

The respondent denies that any award was made in favor of Angarica, but says that an award for a like sum was made in favor of the United States, and that Angarica was not a party to any proceedings at any time pending before the Spanish-American Claims Commission; and, as a consequence, denies that the moneys referred to were paid to the Secretary of State to the use of Angarica, and claims that they came into his hands coupled with duties to the United States which were superior to any duty in the premises to the petitioner's testator; and that, as soon as the Government of the United States assumed to urge and prosecute the testator's claim against Spain, it became thenceforth, in contemplation of law, subject to the will of the Government of the United States, and entirely beyond the control of the testator; and, further, that, in investing the moneys arising from the award, the Secretary of State acted in the performance of a general statutory duty and not for the use and behoof of the testator. As to the alleged agreement of the Secretary of State to pay to the several claimants the interest accruing on such investment, he denies that any such agreement was or could be made, and finally he claims that the United States is never bound to pay interest to its citizens for the detention of money.

The necessary ground of an application for the writ of

mandamus against an executive officer is, that it shall appear that he has been charged by law with the performance of a specific official duty, to which the petitioner is entitled, and that he refuses to perform that duty. The petitioner in this case claims to have shown, in accordance with this rule, that the Secretary of State is charged with an official duty to pay over to her the moneys in question as part of a fund belonging to the estate of her testator, and that this is a duty as to which he has no discretion. We have therefore to consider, first, with what duties this executive officer is charged by law.

Section 202 of the Revised Statutes provides that: "The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department; and he shall conduct the business of the Department in such manner as the President shall direct." This is the only law relating to the duties of that officer in matters of foreign intercourse.

Under this statute it is his duty, in the conduct of every matter which constitutes a part of "the business of his Department," to act "in such manner as the President shall direct," and it appears that every transaction connected with foreign intercourse, which the President shall assign to the State Department, is a part of its business in which he is so to act. If, then, the receipt from Spain and the payment over to the respective claimants of the moneys awarded by the commission, are acts done by the Secretary of State in his official capacity—and it is only in such case that he could be subject to a writ of mandamus—it is because that matter has been made by the President a part of the business of his Department. It

follows that this official duty must be performed "in such manner as the President shall direct." Now it has been decided by the Supreme Court of the United States that the action of the heads of executive departments, in matters which the President is authorized to direct, must be presumed to have been directed by him. We must therefore presume that the Secretary of State has acted by the specific direction of the President in the decision complained of by the petitioner. Whatever might be thought of the propriety of such directions, the Secretary has, in that case, done simply what the law required him to do. In other words, having been directed by the President not to pay to the petitioner the interest derived from the investment of these moneys, it was, so far as he was concerned, his legal duty not to so pay them. It may be added that this presumption of direction by the President is not, in a transaction of such character and importance, merely a theory. As a matter of fact, such business is conducted with his actual concurrence.

It may be that a power and duty as to such payments, independent of the President's control, may be vested in the Secretary of State by the terms of a treaty; for a treaty would be the law of the land, as much as the statute to which we have referred. But this agreement between the American Minister at Madrid and the Spanish Minister of State was not a treaty, and its terms could not modify the operation of a statute, even if they had been intended to do so. As a matter of fact, it contains nothing relating to any power or duty of the Secretary of State, except a provision that he shall name one of the arbitrators. His official duty is governed therefore by the statute, and a refusal to perform a duty imposed by that statute has not been shown.

Another element, to be considered in determining whether we are authorized to apply the remedy of mandamus, is the nature of the petitioner's right. We are of the opinion that, however plain the political obligation of this Government, or of its executive, may be to account to the in-



dividual citizen for moneys *awarded* in compensation of injuries, received from a foreign government and done to him, and for any increment on such wrongs, the right of the citizen is not of such a nature that it can be enforced by this remedy; nor, indeed, do we perceive that any judicial remedy for its enforcement can exist without further legislation.

When one nation treats with another on account of wrongs done to one of its citizens, the transaction is wholly between the two nations. The injured citizen bears no relation, in the proceedings, to the nation on which the claim is made, and is in no sense a party to the adjustment, even though his own government assumes to make the reclamation for his benefit. But his own government may, in connection with the transaction, assume a direct relation with and obligation to him in respect to the indemnity obtained. Indeed, every nation owes to its citizen a duty to protect him against foreign injuries, and to procure for him, when considerations of the common welfare do not prevent it, indemnity for those injuries: and when the state actually intervenes for the very purpose of obtaining such indemnity for him, it recognizes that duty and assumes an obligation to see that he enjoys it. In such a case we conceive that the obligation is manifest, but, in determining the remedy for its enforcement, the question is, what is the nature of that obligation? Does it constitute a legal duty on the part of the state, or of the executive who is authorized to perform it, and establish a legal right on the part of the citizen, in the sense of those terms which is employed by the courts in the administration of municipal law? Clearly it is not an obligation of contract. It arises from a relation which needs no help from contract and cannot be strengthened by contract; that is to say, from the very relation of Government and citizen. It would seem, then, to be merely a part of the state's *political* obligations, and to consist essentially of that general, though very binding, obligation of protection which, by its very origin and constitution, the state owes to the citizen.

Such an obligation may be absolute without being enforceable. And we do not mean to intimate that it is less binding than the legal obligation of contract or than the obligation of an ordinary trust. If there can be any difference, it is more binding; for nothing can equal the stringency and inevitableness of an obligation of public morality and good faith of the obligations of a community in its dealings with the individual citizen, whom it has stripped of all means of compulsion. We intend, therefore, merely to say that, however strong this obligation may be in a political sense, it contains none of the elements of what is known to the courts as contract; and that much less can it be held by the courts that an indemnity, obtained by the state for the benefit of an injured citizen, becomes in a legal sense at once the property of that citizen, or property held for his use. The phrases and analogies of municipal law are constantly found to be misleading in such matters. This transaction established in that sense neither a debt nor a trust nor any trustee. It does not appear, therefore, that the petitioner has such a right as can be enforced by legal remedies. Clearly it cannot be enforced by the writ of mandamus.

These conclusions are sufficient to dispose of the application before us, but, as we were invited by the course of the argument, as well on the part of the respondent—virtually of the Government—as on the part of the petitioner, to consider the actual predicament of this fund, we deem it proper to do so.

We observe that the respondent claims that the retained moneys were invested under the requirement of a general law, and he refers to section 3659 of the Revised Statutes. The meaning of this proposition seems to be, that therefore the investment was not an act done by the executive in the exercise specifically of his powers in the management of a diplomatic reclamation, and that therefore the increment cannot be said to have been, as a matter of fact, devoted by executive action to the use of the claimants.

The section referred to provides that: "All funds held

in trust by the United States, and the annual interest accruing thereon, when not otherwise provided by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum." This provision was taken from section 2 of the act of September 11, 1841, (5 Stat., 465), and it is necessary to look back to the original in order to ascertain its full meaning. The first section of the act of 1841 related to the Smithsonian fund. An earlier act, of July 7, 1838 (5 Stat., 267), had provided that the moneys arising from the bequest of James Smithson were thereby appropriated, and should be invested by the Secretary of the Treasury in the *stocks of States*, bearing not less than five per cent. interest, and that these stocks should be held by him "in trust for the uses specified in the last will and testament of the said Smithson, until provision should be made by law for carrying the purpose of said bequest into effect, and that the annual interest on these stocks should be "in like manner invested for the benefit of said institution." This section was repealed by the act of 1841, which provided instead that the Secretary of the Treasury should, until Congress should appropriate "said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States," &c. Then the original form of section 2 was as follows: "That *all other* funds held in trust by the United States, and the annual interest accruing thereon . . . shall, *in like manner*, be invested in stocks of the United States," &c. The words "in like manner" had the effect of requiring all investments within the statute to be made by *the Secretary of the Treasury*. Neither these words nor any equivalent are found in the revision, but, according to a well settled-rule, the omission is supplied by reference to the original act; and we hold that under section 3659 the trust moneys there referred to must be invested by the Secretary of the Treasury. We are of opinion also that, in all cases within the statute the securities are to be retained by him, inasmuch as he is to

reinvest the accruing interest, and that they cannot be sold and the proceeds paid out, as was done in this case, without further authority of law.

It is apparent from these requirements that the statute relates only to a class of trusts which cannot be interfered with or disposed of by executive power without further legislation, and this construction is supported by contemporaneous facts and other statutes. At the time of the enactment of 1841 there existed certain treaties with the Indians, containing stipulations for the payment to them, annually, of interest upon the proceeds of lands ceded by them; and it had already been provided by the act of January 9, 1837 (5 Stat., 135), which is now embodied in the Revised Statutes as section 2096, that these funds should be invested in securities at not less than five per cent. interest. It was clearly for trusts of this definite character, established as we have said, by law, that the act of 1841 proposed to establish a general system. This is especially indicated by the exception in that act of cases regulated by treaty. The reference is to these Indian treaty funds. We think, then, that the statute did not apply to the transaction in question, and it is evident that the executive did not propose to conform to its requirements. As the circular letter of the Secretary of State informed Mr. Angarica, the Department of State proposed to keep this reserve invested, and only temporarily; while trust funds under the statute were to be held by the Secretary of the Treasury until disposed of according to the will of Congress. As the executive could not fail to know that he could not lawfully sell trust securities that were within the statute, and disburse the proceeds, without legislative authority, it is plain that he assumed and decided to treat this fund as of a different character and wholly within executive control.

These considerations are important in determining what the intention and effect of the transaction actually were; and it is only for that reason that we have been careful to state them. We proceed to consider those questions.

We have said that a state owes to its citizen, when the

common welfare does not prevent such intervention, a duty to procure for him indemnity for foreign injuries, and that, when it actually intervenes for that purpose, it assumes an obligation to see that the indemnity enures to his benefit. The agreement with Spain expressly recognized this duty. It is entitled: "Memorandum of an arbitration for the settlement of the claims of citizens of the United States, or of their heirs, against the Government of Spain for wrongs and injuries committed against their persons and property, or against the persons and property of citizens of whom the said heirs are the legal representatives, by the authorities of Spain in the Island of Cuba," &c. Although, as we have said, the individual claimant bears no relation as such to the foreign government in such an arbitration, his interest is here provided for by a plain declaration that, as between himself and his own government, the arbitration is in his behalf and for his benefit. In pursuance of this intention the last article of the agreement declares that: "The two Governments will accept the awards made in the several cases submitted to the said arbitrators as final and conclusive, and will *give full effect to the same as soon as possible.*" On the part of the United States this included an engagement that the payments made on the awards should enure to the benefit of the claimants, and, inasmuch as it was not then foreseen that any omission or default would occur in providing for the expenses of the arbitration, the meaning of this engagement was further that the whole amounts of the several awards should go to them. We do not mean, however, to express any opinion as to the legitimacy of the temporary retention of five per centum of these amounts, with reference to the unpaid expenses. The agreement is referred to only as one of the means of ascertaining the meaning of the steps which followed, and especially what was *decided* by the executive who had in charge the function of deciding. We find that the Secretary of State informed the claimants that five per centum of the awards would "be reserved *for the present*, to meet the expenses of the commission, until a payment to cover such

expenses shall be made by Spain," and that in his report to the President, which the latter transmitted to the Senate, he said: "The reserve of five per centum may be regarded as provisional only," and, finally, that in his circular letter to the claimants, he said: "It is hoped that no great delay will occur in receiving the payment from Spain which will *liberate this reserve* for expenses, and the Department will expect to keep this reserve invested in interest-bearing securities of the United States *to cover the delay in the distribution to the claimants.*"

These expressions disclose the intention of the executive and determine its effect. This statement to the claimants meant that, notwithstanding the arrangement was provisional, and might end in a permanent retention of the reserve, yet, in case it should be released, the investment should stand as one made in order to cover *the loss suffered by them* from the delay in paying the balance ultimately held to be due them; in other words, that it was provisionally an investment in trust for their benefit. This was not an "agreement" with the claimants, as the petitioner insists, nor was it, on the other hand, the announcement merely of a present intention; it was an executive decision, made in the performance of a duty included in this executive intervention. As in the case of an ordinary legal and enforceable express trust, the nature of the transaction is defined by the party who originates it, so the nature and effect of this administrative transaction was defined and established to be at once in the nature of a provisional trust for the benefit of the claimants. We assent to the respondent's statement in his letter of October 16, 1885 (set forth in the petition), and in his answer, that this reserve *was a trust fund*, but we hold that, instead of being a trust under the statute, it was a trust established by an act of executive discretion. We have already concurred, also, in the opinion stated by him in the same letter, that "*it is res judicata* that the Secretary of State has not discretionary power to dispose of the accumulations resulting from investments made in pursuance of the act of September 11, 1841,"

but we hold that the restrictions of that act do not apply to a trust contrived as merely a part of the management of a diplomatic intervention in behalf of a citizen, and that the executive was entirely at liberty to perform that trust completely by disposing of the whole of its proceeds. And it may be added that he clearly undertook to exercise this very power, when Mr. Secretary Frelinghuysen, in February, 1885, paid over to the claimants that part of the proceeds of the trust fund which represented the principal sum invested. If the investment had actually been within the statute he could not lawfully have done this, nor would it be true that the respondent may, as he proposed to do in the letter referred to, "cause the accumulations to pass into the Treasury," inasmuch as the statute would require it to be reinvested and retained by the Secretary of the Treasury, and not confused with the general funds.

We conceive, then, that these accumulations cannot be withheld from the use declared in this executive trust, without reversing the original executive decision and disregarding the effect of the executive action by which the transaction was moulded and defined. Of course, in case of subsequently discovered fraud, or of plain mistake of fact or law, a later executive could not hesitate to treat the whole matter as an original question, notwithstanding a former decision; but in the absence of these conditions, the settled practice of this Government has been, as the respondent stated in his letter to petitioner's attorneys of October 7, 1885, to treat the former executive action as conclusive. But the conclusiveness of the original action in this case stands on far stronger ground than the rule which treats mere decisions as conclusive. It stands on the principle that a trust once established is not to be undone because the trustor afterwards disapproves of his own act any more than a contract or conveyance may. Although this was not of that class of trusts with which courts of equity deal, as we have already said, yet the principle which we have stated applies to it and governs its administration. When it was decided that this fund should no

longer be reserved, the provisional element of the transaction determined, and the provisional trust became unconditional. According to the rule referred to, the increment incorporated in it has retained the character of trust originally stamped upon it by the Executive. As we have said, however, this trust is not enforceable, and the petition is accordingly dismissed.

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DISTRICT OF COLUMBIA *vs.* THOMAS E. WAGGAMAN ET AL.

LAW. No. 24,492.

{ Decided November 9, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. The Organic Act of 1870, R. S. D. C., while it did not give to the legislative assembly the larger powers of general legislation which Congress had itself received from the Constitution, nevertheless bestowed upon that body, in express terms, every power of municipal legislation which could be given to a municipality, and particularly the power of taxation, and the implied or included power of providing measures by which taxes may be enforced and collected.
2. It is well settled that a general power of taxation may be exercised to tax vocations, and to require returns and test their accuracy by inspections.
3. Ordinances enacted by a municipality, under its implied power to enact such, must be reasonable; but where its power over a given subject is derived from an express legislative grant, the court can only construe the extent of the grant; it has nothing to do with the reasonableness of an ordinance enacted by virtue of it.
4. The provisions of the act of assembly of August 23, 1871, as amended by the act of June 20, 1872, imposing a tax on the commissions of real estate agents and requiring semi-annual returns thereof, is not in excess of the power granted to the legislative assembly by the organic act of 1870; nor does the provision requiring the register, when, in his opinion, the returns are underestimated, to examine the books of the person making such returns, affect its validity; even if it be assumed that such provision is unauthorized.
5. The bond required by the same act may be conditioned only upon the performance by the obligor of the duties required of him by law; and a bond with additional conditions extorted *colore officii*, by withholding a license to carry on the obligor's business until he executes it, cannot be enforced as to such additional conditions, although it will be valid as to the others.



Appeal to the General Term from a judgment on a bond.

THE CASE is stated in the opinion.

WILLIAM F. MATTINGLY for appellants.

A. G. RIDDLE and FRANCIS MILLER for respondent.

Mr. Justice JAMES delivered the opinion of the court.

This suit is brought for breaches of a bond given to the District of Columbia by Waggaman as principal, and Pilling and Clarke as sureties. A recital states that Waggaman had obtained from the District a license to engage in the business of real estate agent, pursuant to the act of the legislative assembly, approved August 23, 1871, and acts amendatory thereof; and the conditions are: "That if the above bounden Thomas E. Waggaman shall well and faithfully in all things comply with said act and acts amendatory thereof, and honestly and duly perform all duties required by law of him as real estate agent, and shall account and pay to the said District or the proper officer thereof, or to any other person or persons, all sums which may be due and owing by him by reason of said license and the business authorized thereby, then this obligation to be void; otherwise to be and remain in full force and virtue."

The declaration avers that the defendant, Waggaman, being desirous of engaging in the business of real estate agent, and having obtained a license for that purpose on December 6, 1882, executed the above bond, with Pilling and Clarke his sureties; that Waggaman engaged in said business but did not comply with the acts of the legislative assembly referred to therein and did not perform the duties required by law of him in this: that he did not, on or before January 10, 1883, or since said time, under oath or affirmation, make a due return to the assessor of the District of Columbia of the receipts and commissions received by him as real estate agent for the six months ending January 10, 1883, or any part of said time, whereby the plaintiff was

unable to assess the license tax on account of said receipts and commissions; and the same is unpaid, by reason of which breaches plaintiff has sustained damages in \$1,000. To this declaration the defendant, Waggaman, filed three pleas: 1. That the alleged deed is not his deed. 2. Denying breaches. 3. That the act of the legislative assembly and the act amendatory thereof, so far as they imposed a license upon real estate agents and required them to execute such a bond as sued on, have been repealed by section 19 of the act of Congress of July 12, 1876.

The defendants, Pilling and Clarke, pleaded that the alleged deed is not their deed.

In order to show the nature of the defence, it is necessary to state some of the provisions of the acts of the legislative assembly referred to.

The act of August 23, 1871, is entitled "An act imposing a license on trades, business and professions practiced or carried on in the District of Columbia." The 1st section provides that no person shall be engaged in any trade, business or profession mentioned in the act until he shall have obtained a license therefor, as afterwards provided; and the 2d section provides the steps to be taken for obtaining the license. The previous giving of a bond is not one of these. Then section 15 provides that "Every real estate agent shall give bond to the secretary of the District of Columbia in the sum of \$5,000, with two good and sufficient sureties, to be approved by the Governor, for the honest and due performance of all duties required by law;" and further provides that "Every real estate agent failing to comply with the provisions of this section, shall, on conviction, forfeit his license and be fined not less than \$100." It appears, then, from sections 2 and 15, that the license is not to be withheld until the bond shall have been given, but is to be issued upon the performance of other conditions, and is only liable to revocation if the bond is not given. The reason for referring to this point will appear when we come to consider the grounds of the defence in this case.

Section 21, clause 38, as amended by the act of June 20,

1872, ch. 49, provides that "Real estate agents shall pay \$25 annually, and in addition pay semi-annually a tax of one per cent. on their commissions." For the purpose of ascertaining the amount of the commissions on which this tax is to be paid, section 17, as amended by the act of June 20, 1872, ch. 49, provides "that whenever in this act a tax is imposed semi-annually on sales or receipts, returns for the same shall be made to the register, under oath or affirmation, on or before the 10th days of January and July of each year, and the same shall be due and payable to the collector on or before the 30th of said month." This section further provides that "if, in the opinion of the register, the returns required by law are underestimated, he shall have power to examine, either in person or by deputy, the books and accounts of the person making such returns; and if he shall find that the returns made are less in amount than that shown by said books and accounts, he shall make an assessment for a correct sum, to which he shall add a penalty of twenty-five per cent. on amount of tax due."

The case was tried in the circuit court upon the following stipulation, by which some of the facts relied on by the defence are presented:

"1. A trial by jury is hereby waived.

"2. The bond in suit, and produced by the plaintiff, was signed and sealed by the defendants.

"3. That during the last half of the year 1882, the defendant Waggaman was a real estate agent in the District of Columbia, and obtained his license to do business as such within a few days after the date of said bond; but before said defendant could obtain such license, he was required to execute said bond in the form in which it is, and have the same approved by the Commissioners of the District; and unless said bond had been executed and approved, said defendant could not have obtained his said license to carry on in said District the business of a real estate agent.

"4. That said Waggaman's gross receipts from commissions in his said business, during said six months, was the sum of \$11,060.44, of which he made no return.

"5. The tax upon real estate agents is imposed under and by virtue of clause 38, section 21, of the act of the late legislative assembly, of August 23, 1871, ch. 69, as amended by the subsequent act of June 20, 1872, ch. 49. That under section 3 of the latter act, the assessor, as successor to the register, arranged the laws relating to licenses in the form of a circular, and distributed printed copies thereof. That three of the clauses of said section 21 having been either repealed or adjudged illegal, the assessor in his said circular, wholly omitted said three clauses, but continued a consecutive numbering of the others which were retained, whereby in said printed circular, said clause 38 relative to real estate agents was numbered 35. The real estate agents, as a class, having petitioned Congress for the repeal of the law imposing a license tax upon them, the committee of Congress having the matter in charge had before it, as evidence of said act of the legislative assembly of August 23, 1871, the said printed circular, and said committee having reported favorably upon said petition, Congress passed said act of July 12, 1876, 19 Stats., 83, repealing clause 35, section 21 of said act of August 23, 1871; after which time until some time in 1882, it was supposed that the law imposing a license tax upon real estate agents was repealed, and none was required of them. In the latter part of 1882, it was discovered that clause 35 of said act referred to photographers, and since then they have been held by the District as not required to pay a license tax, and real estate agents have been so required.

"6. That all acts of the legislative assembly, as published, and all acts of Congress having, in the opinion of either party, any bearing upon the subject, may be read at the hearing."

The circuit court entered judgment in favor of the plaintiff for \$110.60 and costs; whereupon the defendants appealed.

The matters stated in the fifth clause of the stipulation were intended to support the third plea of the defendant Waggaman, viz., that the act of the legislative assembly and

the act amendatory thereof, so far as they imposed a license upon real estate agents and required them to execute such a bond as sued on, have been repealed by the act of Congress of July 12, 1876. We may dispose of this plea at once by saying that, although as a matter of history, the facts presented may show that it was the intention of the persons who had charge of that business to effect a repeal of these provisions, they show, as a matter of law, that they were not repealed.

It was not upon this proposition, however, that the defendants seriously relied at the argument. Their principal grounds were that, notwithstanding the broad terms of the organic act which established the District government and the legislative assembly, the latter could not be clothed with legislative powers, and therefore had only municipal powers; that, according to the rule by which such powers are measured, its acts must be reasonable, and that a tax on vocations was unreasonable, and in this case was connected with and dependent upon another provision authorizing an invasion of rights by a scrutiny of private and lawful transactions which was beyond the powers of a municipality. Next, as to the particular bond in question, it was insisted that, because it contained conditions not authorized by the act and was extorted *colore officii*, it is void.

We have to consider first, then, the validity of the act of the legislative assembly which imposed this tax on commissions earned by real estate agents, and required a semi-annual return of those commissions and a bond to secure the performance of these and other acts prescribed by law.

In *Roach vs. Van Riswick*, 7 Wash. L. Rep., 496, this court held that the very broad terms in which the organic act of 1870 granted legislative powers to the legislative assembly had the effect to clothe that body with only such powers as might be given to a municipal corporation, and that it was not competent for Congress to delegate the larger powers of general legislation which it had itself received from the Constitution. We are still satisfied with that decision; but we hold, on the other hand, that the pro-

vision referred to had the effect to bestow every power of municipal legislation which could be given to a municipal corporation, and especially the power of taxation and the implied or included power to provide measures by which taxes may be enforced and collected. Section 49 of the organic act provided that "the legislative power of the District shall extend to all rightful subjects of legislation within the District, consistent with the Constitution of the United States and the provisions of this title;" and section 57 provided that "the legislative assembly shall not have power to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents."

These restrictions of the power to impose taxes amount, according to the principle of construction applied by the Supreme Court in the *Legal Tender Cases*, 12 Wall., 534, to a declaration that the same act had already conferred the general power. Mr. Justice Strong, speaking of the restriction of the power to suspend the writ of *habeas corpus*, says: "It shows irresistibly that somewhere in the Constitution power to suspend the writ was granted." In the case before us the restriction has a direct application. It refers to the general grant of legislative power contained in section 49; and this construction, being part of the same act, is binding on the courts. It instructs us that the general grant of power to legislate on all rightful subjects, etc., is by inclusion, an express grant of power to legislate on the subject of taxation, except as limited in section 57; and this express power to legislate on this subject includes, of course, the power to legislate on the means of ascertaining the extent of the object taxed; in other words, to require returns and to test their accuracy by inspections. We repeat that these are not implied powers, powers existing only by implication; but powers included in the descriptive terms of the express grant, and therefore to be treated as expressly granted powers. The importance of this distinction will presently appear. Recurring then to the doctrine that the general grant had the effect to bestow

only so much power as may be given to a municipality, we have to add that the power to tax vocations, and to provide complete means for ascertaining the extent of the object taxed and for securing collection, may be so conferred. This doctrine has been too well settled by authorities to need further vindication.

But it was insisted that, in order to be valid, the exercise of this power must be "reasonable," and that the provisions, requiring returns of commissions earned and imposing a tax thereon, are not reasonable. This test of the validity of a municipal act or by-law cannot be applied when the power to legislate on the subject has been expressly conferred. In that case we have only to construe the grant, and when the grant imports that the full power is given and that the measure and manner of its exercise are intrusted to the grantee, we have no more to do with the reasonableness of its exercise than with the reasonableness of an act of Congress. The judicial control here invoked belonged to a different class of cases. In England the subjects upon which by-laws might be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had implied or incidental power to pass by-laws; but this power was accompanied with the limitation that every by-law must be reasonable. And in this country the courts, in affirming the general incidental power of municipal corporations to make ordinances, have always declared that ordinances passed in virtue of the implied power must be reasonable. Dill. Mun. Corp., sec. 253, and cases cited.

In other words, the courts have held that where the existence of a power depended on judicial implication, they were not at liberty to imply power to do what was unreasonable. Plainly this rule does not apply in construing the extent of an express grant of power, and we are dealing only with an express grant. When we find as a matter of construction, that Congress has granted this power, we must refrain from considering whether that grant or the authorized exercise of it was reasonable. We can only consider

whether it was exceeded, and we do not find that it was exceeded in anything done in the case before us. It was urged in the argument that the provision for semi-annual returns of earnings was so connected with the provision for an official search into the real estate agent's private accounts as to be tainted by the latter provision, which could not be held to have been authorized by Congress. But if we assume that it was not authorized by any fair construction of the granted power, we cannot admit the alleged effect of that provision. It was not invoked in this case, and the making of an honest return cannot be said to be compelled by it, if made. The power to demand the return was clearly incident to the power to tax the commissions received, and could be exercised equally whether the same law provided for an official search and inspection or not. Moreover, the statute only provided for such an inspection in case of a return actually made but supposed to be underestimated, and does not apply at all where no return is made, as in the case of the defendant. The argument of dependent relation between the two provisions fails therefore, as matter of fact as well as of law.

The next objection to a recovery on this bond was, that it contains a condition not authorized by the statute; that this unauthorized condition was extorted from the defendant Waggaman, *colore officii*, and that a bond which is not required by law is not obligatory unless it is found to be a voluntary control on the part of both parties.

We have no doubt that so much of the condition of the bond as required the defendant to account and pay to any other person than the District "all sums which may be due and owing by him by reason of said license and the business authorized thereby," was unauthorized by the statute. The requirement that bond should be given "for the honest and due performance of all duties required by law" refers only to the duties named in the statute, such as the making of semi-annual returns of his commissions and the payment of tax thereon, and does not refer, as the condition of the bond actually taken does, to the payment of all sums due,



for example, to his principals. We are of opinion also that this unauthorized part of the condition is shown by the facts stated in the stipulation to have been extorted from the defendant *colore officii*. It is there agreed that, before the defendant could obtain his license he was required to execute the bond "in the form in which it is," and that he would not have been granted a license otherwise. In *United States vs. Tingey*, 5 Pet., 115, a bond with conditions not required by law, and thus obtained, was held not to be the contract of the alleged obligor, because it was not a voluntary contract. On this principle it is clear that so much at least of the conditions in this case as was not required by law is not obligatory. But does it follow that the whole of the bond must be treated in the same way? We think not. That part of the conditions which secured the performance of the defendant's duties toward the District was legal and is severable from the illegal portion. It is capable of being treated as a complete contract by itself. Now the doctrine relating to contracts extorted *colore officii*, applies only to contracts which the law does not require. As such a bond stands, not upon the statute, but upon the voluntary consent of the party to assume obligations outside of the law, it is important to ascertain whether it was obtained *colore officii*; but where the law requires a certain condition to be inserted, the pressure of the officer demanding it, is not pressure of official power but the actual possession of it; and the party, who has only complied with a legal obligation, will not be heard to say that he did not act voluntarily but under lawful compulsion. The lawful condition of this bond, then, was given voluntarily, and is severable. In such a case it can be enforced. In *United States vs. Hodson*, 10 Wall., 408, the Supreme Court said: "It is a principle of law that where a bond contains conditions some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced." In accordance with this principle we hold that the bond in this case contains a perfect obligation, to the extent of all the duties of the defendant toward the District.

But it may be objected that the facts in this case do not permit the application of the principle which we have just stated; that the act of 1871 did not require any bond to be given before the license should be issued, while the stipulation shows that this bond was exacted as a condition to the issuing of the license; that, therefore, in giving any bond at all, the defendant did an act which could not, at that point of time, be exacted of him, and that consequently, such act cannot be regarded as the mere performance of a legal duty, which must be treated as done voluntarily. We think this objection is immaterial. The provisions of the 1st and 17th sections show that the defendant could not lawfully pursue his vocation without the performance of two preliminary conditions, namely: the obtaining of a license and the giving of a bond. Although the statute indicates a particular order in which these acts are to be done, that order is not of the essence of the matter, and an inversion of it could not in any way affect the rights of the applicant for license injuriously. The very same bond would be required in either case. If this bond is severable, and the lawful condition can be treated as the kind of bond which the law required to be given ultimately, as one of the two duties to be performed before the defendant could lawfully proceed, he must notwithstanding the order in which those acts were required, still be regarded as having done merely what the law required, and therefore as having acted voluntarily and not by constraint imposed *colore officii*. We find the bond sued on to be the actual bond of the defendant to the extent of the lawful condition.

The judgment is affirmed.

FREDERICK KOONES

vs.

THE DISTRICT OF COLUMBIA AND JOHN F. COOK.

{ Decided February 1, 1886.  
{ The CHIEF JUSTICE and Justices COX and MERRICK sitting.

EQUITY. No. 9,148.

1. The doctrine which expands an agency by reason of the acts and dealings of the parties has no application whatsoever to the official acts of a public officer. Whoever deals with him is charged with knowledge of the law limiting his power.
2. The collector of taxes of the District of Columbia has no authority under the law to receive checks in payment of taxes.
3. A taxpayer delivered his check in payment of taxes to the collector. That officer delayed for several days to present it to the bank for payment, during which time the bank failed and the check was dishonored. *Held*, that the reception of the check by the collector was not a payment of the tax, as the check was subsequently dishonored. That for the purpose of presenting it to the bank for payment the collector was the agent of the tax-payer, and the loss occasioned by the delay must therefore fall upon the latter.
4. Cox, J., however, limits his concurrence in the judgment to the fact of the insolvency of the bank at the time of the reception of the check by the collector, and the want of satisfactory proof that it would have been paid even if there had been no delay in its presentation.

Appeal from a decree dismissing bill in equity.

THE CASE is stated in the opinion.

E. A. NEWMAN and A. A. BIRNEY for complainant:

The delivery of a check by a depositor upon his banker for value, operates to transfer to the holder the legal title to so much of the deposit as the check calls for, and the banker, on its presentation, becomes liable to its owner if he has funds of the drawer sufficient to meet the same. *Munn vs. Burch*, 25 Ill., 21.

It is settled beyond all controversy that where the parties reside in the same place, if the holder of a check neglect to present it on the day after he received it, he takes the risk of the bank failing. *Byles Bills*, 6th Am. ed., p. 20, and *note* 1; 2 Chit. Pl., 16th Am. ed., 362; 2 Dan. Neg. Inst.,

516, 522, and authorities cited; *Alexander vs. Burchfield*, 7 M. & G., 1061; *Taylor vs. Wilson*, 11 Met., 51.

A check is intended to be the representative of cash. 2 Dan. Neg. Inst., 522.

"As checks are in constant use and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important for the security of all parties concerned that there should be no mistake about the *status*, which the holder of a check sustains towards the bank on which it is drawn." *Bank vs. Millard*, 10 Wall., 156.

The Supreme Court, in *Bank vs. Millard*, uses this language:

"The check was commercial paper and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents."

This doctrine, with equal cogency of reasoning, is fully declared by the same court in *U. S. vs. Bank of Metropolis*, 15 Pet. (40 U. S.), 377; *U. S. vs. Barker*, 12 Wheat. (25 U. S.), 559.

It is to be borne in mind that there is no statute declaring what shall be or shall not be received by a collector in payment of taxes. His duty is "to collect all taxes." Act of Legislative Assembly, Aug. 23, 1871.

A. G. RIDDLE for defendants:

1. Under the law there is no authority by the collector to receive checks in payment for taxes; if he does, the tax is not paid until cash is received on it. To receive and collect a check, the collector is the agent of the party paying, and the risk is his. If delivery of check is payment, that is the end of the transaction so far as the payer is concerned. No question of laches can arise.

2. On the evidence it is clear that had the check been presented on the 29th or 30th of May, it would not have been paid. The bank was without funds sufficient to pay it.

Mr. Justice MERRICK delivered the opinion of the court.

The court has considered the facts in this case, and thinks it is apparent that the complainant is not entitled to any relief whatsoever at the hands of a court of equity or of any other court as against the District of Columbia.

He claims that on a certain day he paid the taxes which were due by him to the District of Columbia in a check for four hundred and ninety odd dollars on the bank of Middleton & Co. of this city, which bank was open at the time the check was drawn and remained open the next day. The third day, however, it suspended, and the collector not having presented the check there on the day of its receipt or the day after, it is claimed therefore that the complainant is to be credited with the amount by reason of the default of the collector in not presenting the check in due season, according to the mercantile law, for payment at that bank.

There is no question in this case, as to the law touching commercial paper, or the obligation of a holder to present a check within a reasonable period—twenty-four hours if in the same town; and if he does not present it in that time, and the bank thereafter fails, the drawer of the check would be entitled to be discharged, because that check has been a payment as between the original parties to the check.

But the question in this case, as I say, is not a question of commercial law; it is a question of agency. Was the collector of taxes authorized by the law of the land, or by any properly delegated authority from the municipal officers superior to him, to accept in payment of taxes anything else than money?

The doctrine which expands an agency by reason of the acts and dealings of the parties from time to time, has no application whatsoever to the official acts of a public officer. Everybody knows by the public law of the land (or is charged with knowledge of) the extent of the power of that officer, and his superior officers, so to speak, cannot qualify it except so far as the law has delegated to them a

power to control, or modify, or expand his legal obligations. Hence, there can be no such thing as a presumption of agency growing out of the dealings of a public officer in respect to his public duty; because whatever presumption, as between private parties, might arise in favor of a delegated authority from an outward act of dealing, so far as the public officer is concerned that presumption is repelled by the known law of the land, the knowledge of which is imputed to every citizen, which known law of the land limits, defines and bounds his power, and qualifies and corrects any presumption of agency which might otherwise arise out of these acts and dealings.

That being the case, what is the effect of a payment by a check ordinarily? It is but in itself a conditional payment to be ripened into an actual payment, provided the check be honored by the bank. But the probability that that conditional payment may be ripened into an actual payment, does not advance a single step towards the establishment of a right of a public officer in the character of agent of the public to surcharge the public with an additional risk in respect to the collection of its public dues.

The law says that the collector shall collect the taxes. The law further, to secure the taxes, and in addition to the personal responsibility, makes the taxes a lien upon the real estate—the visible estate of the party in question. Now can it be said that a practice, no matter how long indulged in by the collector for the convenience of parties, of receiving from tax-payers checks upon their bankers can be considered to supersede, to dispense and put aside at his pleasure the lien of absolute security which the public has for the collection of its taxes by its hold upon the property of the party? That would extend the law of agency beyond anything that has any foundation in well-established precedents or authority in the books, because the books say that by the taking of a check you superadd to the original predicament of uncertainty of payment as between the debtor and creditor, the uncertainty of payment arising out of the possible insolvency of the drawee of the check, and the ob-

ligations of diligence on the part of the holder to present that check within due season in order to preserve his demand against the original holder.

That being the law of agency, so far as agents are concerned and the law modifying the payment of agents, can it be said that a public collector, without any warrant of law whatsoever, who is dealing for the convenience of the parties, is authorized to put his personal judgment, his personal inclination to promote the convenience of and to accommodate the tax-payer in lieu of the legal lien, and thus, for those imperfect and almost frivolous considerations, so to speak, to waive the certainty of the right of collection and the security that the public has for its taxes?

But in this particular case, even if you were to assume that there was the semblance of a recognized practice ripening into law to pay by checks, that surely would only be a recognized usage to pay by checks upon authoritative and well-established banks. The word "check" has a signification, a sort of cabalistic meaning, in the mind of the public, because it represents ordinarily, and the meaning of the term implies, that it is a draft by a holder or depositor upon a well-accredited and established bank which stands almost in the place of an actual bank note from the bank itself. And it is because of that character that the commercial law has attached to it the consequences which follow by reason of the presumption of a payment when it passes from man to man in their private transactions.

But can it be said that the recognition of such a usage, such a qualified mode of payment with regard to a check thus designated and characterized, and which is the true meaning of it, can be expanded into the recognition of an agency on the part of the collector to take a private order from any individual against another individual, or any of these brokers who are about in the town here, who assume to themselves, for the purposes of their own trade, the formal, the solemn, the imposing epithet of bankers? They are not bankers in any sense of the term. They do not come within the proper designation of bankers, and a check upon

these so-called bankers, if you would translate it into the common English, and say that a man has given to the collector an order upon some private broker down in town here, some private individual, you would at once see that this did not come at all within his power and authority as a designated agent, so as to relieve the drawer of that check of his obligation and throw the burden upon the District of Columbia for non-payment upon the presumption of the agency.

That was the character of this check—an order given on the supposed or so-called banking house of Middleton & Co., who were utterly insolvent at the time it was granted, and who made an assignment the day after. Under circumstances of this sort it would be of the saddest consequence, it would be subversive of the whole security of the public for a court of justice to entertain for a moment the idea that checks of that description could be considered as payment of taxes, the citizen be subserved, and the public thrown into the necessity of making up for the want of credit of the parties upon whom such drafts are drawn.

There was a case somewhat similar to this in its general features decided in England in the year 1839, which was the case of *Bridges vs. Garrett*, reported in the Law Reports, 5 Common Pleas, page 451, which was the case where the steward of a lord had received the sum of seventy-eight pounds and odd shillings in payment of a fine for the renewal of certain copyholds. The check was drawn upon a banker and was a cross check as they call it in England, and that check was put to his credit in the bank, it was actually paid and went to the credit of the agent who was entitled to receive the money, and afterwards the fund was stopped by the bank, it having been mingled with his common account, for the purpose of making up a deficiency in that account as between him and the bank. The question there was whether the payment of that check under such circumstances was a valid payment. The court below refused to admit it as a payment even under such circumstances, but the court above said that the check having



been, in point of fact, paid as a check, and then deposited by the agent in his own bank, he had, therefore, received it, and being authorized to receive the amount of the fine, and the check having been actually paid, it thereby became a payment, and his depositing it in his bank, and its subsequent conversion by his banker to his own private account, would not deprive it of the character of a payment when it was honored at the bank upon which it was drawn as between the debtor and the creditor.

And that is the whole scope of this case, and of the whole line of cases. I have not seen a case anywhere reported in which it was held that payment by a check which was afterwards dishonored could be considered a payment, in any sense of the law, unless the party who received it had been specially authorized to receive it, or by the course of trade was to be presumed to have been authorized to receive it, and thus to assume for the creditor the additional burden of the risk of want of diligence in the presentation of the same.

But it is utterly inadmissible in the case of public officers to add to the trouble and burdens of the public for the purpose of saving an individual who has paid by check exclusively for the gratification of his own private convenience. Having done it for his own convenience he must take the consequences of having made the collector of taxes his own agent, and not say that in that respect he was the agent of the public.

Under these circumstances the decree of the court below will be affirmed with costs.

Mr. Justice Cox said:

I agree in the conclusion announced in this case, but I have some doubts about it and, therefore, do not wish to be committed to the general proposition that would exclude from a case of this kind the general rules about commercial paper.

It is conceded, as between individuals, if a man gives a check in payment of a debt on a solvent bank which would

be honored on presentation, and the money is lost through the failure of the creditor to apply for the money until the bank has become insolvent, that the creditor makes the check his own, and his debt is considered paid.

I doubt whether a different rule applies where a check is tendered and received in payment of public dues. It would rather seem to me that under the circumstances presented in this case, it would be substantially the same as if the creditor had had the check passed to his credit, and had lost it afterwards by allowing it negligently to remain in the bank until it had become insolvent.

But however that may be, it is demonstrated in this case that at the time the check was given the so-called bank was absolutely insolvent. By the testimony of the bankers themselves it appears that the assets at the time did not amount to one-tenth of the liabilities of the bank. The burden of proof, of course, is upon the complainant in a case like this to show that his check was good, and that the loss was caused by the neglect of the other party.

The proof in the case utterly fails to satisfy us that this check would have been paid if it had been immediately presented. The testimony of one of the bankers is that the check would have been paid if presented, as another check for \$71 had been paid the same day. We think that is totally unreliable. It appears that after the assignment, which was made the next day, when the receiver took possession of the bank there was not more than forty or fifty dollars in the bank in cash. The banker testifies that on the twenty-ninth there were several thousand dollars in bank. Whether it was there five minutes after the time the bank opened and was available for the payment of this check or not is not shown. The books have not been produced to show what amount of money there was. The burden of proof is on the plaintiff, and he has certainly failed to satisfy us that the check was worth a cent.

## COLUMBUS THAW vs. MARIA RITCHIE.

LAW No. 24,092.

{ Decided January 25, 1886.  
{ Justices HAGNER and JAMES sitting.

1. The Orphans' Court of the District of Columbia has no jurisdiction to decree a sale of an infant's real estate.
2. In ejectment, adverse possession by the defendant and those under whom he claims will not avail to defeat the plaintiff's claim, if it be otherwise well founded, when it appears that the plaintiff who was a remainderman had no right of entry upon the property until after the death of the life tenant which occurred much less than twenty years before the institution of the action.
3. When a reviewing court has positively determined that judgments in a certain direction are nullities for want of jurisdiction in the court that rendered them, their number is unimportant; no accumulation of usurpations can establish jurisdiction in the entire series if it does not exist in each individual case.
4. Although a person in the possession of property may defend his title under a judgment of a court of competent jurisdiction his defence will be disallowed if there was want of jurisdiction in the court to enter the decree under which he claims title, however innocently he may have purchased the property.
5. Where one is not a party to a deed and does not claim under it, he is not estopped by its recitals.
6. A will declared as follows: "Item. I give and bequeath to my beloved wife, Eliza, all my property of every description, real and personal, to hold and enjoy during her natural life, in trust, for the equal benefit and maintenance of herself and of my daughter, Columbia, and of my son, Columbus." \* \* \* "Item. I give and bequeath to my two children above named, in equal parts, their heirs, etc., all my estate, real and personal, that shall remain at and after the death of their mother, my said wife, Eliza." *Held*, that the wife took a life estate only.

## STATEMENT OF THE CASE.

This was an appeal from a judgment for defendant in an action of ejectment brought to recover an undivided moiety of two lots of ground in Washington City, which the plaintiff claimed in fee simple under the following will of his father Joseph Thaw:

## WILL.

"I, Joseph Thaw, of the city of Washington, in the District of Columbia, do, this twenty-sixth day of February in the year of our Lord one thousand eight hundred and forty,

make and publish this my last will and testament, which is as follows, namely:

*"Imprimis.* I hereby appoint and constitute my beloved wife, Eliza Van Tylin Thaw, to be the guardian of my two youngest children, to wit, my daughter, Columbia Thaw, and my son, Columbus Thaw, and to act in trust for them, in all things as fully as I would do if living.

*"Item.* I give and bequeath to my said beloved wife, Eliza, all my property of every description, real and personal, to hold and enjoy during her natural life; in trust, for the equal benefit and maintenance of herself, and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property, as above, for the equal benefit of herself and the survivor of the two above-named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife, Eliza, shall hold the said property during her natural life for her own sole use and benefit; and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life, for the maintenance of herself and of the two children aforesaid, while they, or either of them shall live, or of herself, while she shall survive them both.

*"Item.* I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife, Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole.

*"Item.* If both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife, Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description.

"I do moreover hereby constitute and appoint my beloved wife, Eliza Van Tylin Thaw, above named, the sole execu-

trix of this my last will and testament, and authorize her to administer and execute the same without giving security in any way whatever.

"Signed and sealed the day and year first above written.

"JOS. THAW. [SEAL.]

"Witness: The word "*die*" on first page first interlined.

"O. B. BROWN,

"SAM'L GRUBB,

"JOHN McCLELLAND."

The testator, Joseph Thaw, died, seized of this property and another property on New York avenue, in 1840, leaving his widow, Eliza, and two children, Columbus and Columbia Thaw, who are the persons named in the above will. In 1848 Columbia conveyed her interest to one Agricol Favier. The death of the life tenant, Eliza Thaw, occurred in 1866.

The defendant was in possession of the property in question, and claimed title adversely to the plaintiff under and through a deed dated March 17, 1848, and recorded in 1867, from Eliza V. Thaw to Agricol Favier, purporting to convey the property in question by authority of a decree of the Orphans' Court of this District, passed the 29th day of March, 1844, upon the petition of the said Eliza V. Thaw as guardian of her infant children, Columbus and Columbia Thaw. This deed, executed in due form, recited as follows:

DEED.

"This indenture, made this seventeenth day of March, in the year of our Lord one thousand eight hundred and forty-eight, between Eliza V. Thaw, of the city of Washington, in the District of Columbia, of the one part, and Agricol Favier, of the same city and District, of the other part.

"*Whereas* a decree was passed on the twenty-ninth day of March, in the year one thousand eight hundred and forty-four, by the Orphans' Court for the county of Washington, in the District of Columbia, upon the petition of Eliza V. Thaw, guardian of her infant children, Columbus and Col-

umbia Thaw, and whereas, the said Eliza V. Thaw, was thereby appointed a trustee to sell lots numbered one and four in square one hundred and sixty, in the city of Washington, which decree was, on the twelfth day of October, in the year one thousand eight hundred and forty-four, confirmed by the circuit court for the county of Washington, sitting as a court of chancery, and the said Eliza Thaw having in conformity with said decree filed a bond with sureties, which was approved by the said Orphans' Court, and having in like conformity with said decree, sold said lots, above mentioned, and reported the same to said court, which report was, by said court, on the twenty-first day of January, in the year one thousand eight hundred and forty-eight, duly approved, ratified and confirmed; and whereas, the said Agricol Favier was the purchaser of the said lots, from her, the said Eliza V. Thaw, the trustee as aforesaid, under the power vested in her by the said decree.

"Now this indenture witnesseth, that the said Eliza V. Thaw, for and in consideration of the sum of ——— lawful money of the United States to her in hand paid by the said Agricol Favier, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, (hath granted, bargained, sold aliened, enfeoffed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff and confirm unto the said Agricol Favier, his heirs and assigns forever, two lots or parcels of ground, situate, lying and being in the city of Washington, in the District of Columbia, being lots numbered one (1) and four (4) in square numbered one hundred and sixty (160) as designated on plan of said city, together with all and singular the buildings, improvements, ways, alleys, rights, members, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, claim and demand whatsoever, legal and equitable of her the said Eliza V. Thaw as guardian and trustee as aforesaid, and well as in her own right, and of the said infant children Columbus and Columbia Thaw to the same.

"To have and to hold the said two lots or parcels of ground

hereinbefore described, and all other the premises hereby granted, bargained and sold or mentioned or intended to be, and every part and parcel thereof with their and every of their appurtenances, unto the said Agricol Favier, his heirs and assigns forever, to the only proper use and behoof of the said Agricol Favier, his heirs and assigns forever. And the said Eliza V. Thaw, doth hereby for herself, his heirs, executors and administrators, covenant and agree to and with the said Agricol Favier, his heirs and assigns, that she, the said Eliza V. Thaw, and her heirs, shall and will at all times hereafter, at the request and cost of the said Agricol Favier, his heirs or assigns, do any further act, the better to convey the said premises unto him, which he shall or may require.

"In witness whereof the said Eliza V. Thaw hath hereunto set her hand and seal the day and year first above written.

"ELIZA V. THAW. [SEAL.]

"Signed, sealed and delivered in the presence of—

"T. C. DONN,

"JOHN L. SMITH.

"DISTRICT OF COLUMBIA, }  
     *"Washington County."* } *To wit:*

"We, Thomas C. Donn and John L. Smith, justices of the peace in and for the county above named, do hereby certify that Eliza V. Thaw, a party to the foregoing deed of indenture, bearing date the seventeenth day of March, 1848, and hereunto annexed, personally appeared before us in our county aforesaid, the said Eliza V. Thaw, being personally well known to us to be the person who executed the deed and acknowledged the same to be her act and deed.

"Given under our hands and seals this seventeenth day of March, 1848.

"T. C. DONN, J. P. [SEAL.]

"J. L. SMITH, J. P. [SEAL.]"

To sustain the authority of Eliza Thaw to make this deed, docket entries and such papers as were to be found among

the records of the court were offered in evidence as tending to prove the truth of the recitals in the premises of the deed. And further *to show to the court* that the practice and proceedings under the act of Maryland of 1798, for the sale of real estate of infants for their maintenance and support had been in numerous cases, both before and after the proceedings in question, substantially like the practice and proceedings in this case. The defendant read in evidence the docket entries in ten cases brought between 1823 and October 12, 1844, in the old circuit court on the chancery side, and twenty-four cases brought in said court between October 12, 1844, and April 21, 1853. He also read in evidence the entries in twenty-six cases of a similar character, brought in this court between 1863 and July, 1865.

He then offered to read in evidence the proceedings set out at large in the records of the Orphans' Court in numerous cases from 1865 to 1881, and read the proceedings in several cases selected at different periods between said last mentioned dates, wherein the practice and proceedings were similar to that in this case. And also to read in evidence the docket entries in thirty-two other similar cases, when it was admitted by counsel for plaintiff that these docket entries showed that the practice pursued in those causes was similar to the practice in this case.

To the admission of the above deed and the said records and papers as evidence the plaintiff objected, on the ground that Mrs. Thaw had no authority under her husband's will to make the conveyance, and that the proceedings shown were without authority of law, the Orphans' Court having no jurisdiction to decree the sale of an infant's real estate; but the objection was overruled by the court, and this ruling forms the principal subject of exception taken at the trial.

To maintain an estoppel on the part of the plaintiff, the defendant also offered and was permitted to read in evidence a deed dated March 1st, 1871, and duly recorded, of the plaintiff and his wife and Columbia Thaw and her husband, purporting to partition between themselves certain real estate left by their mother, which deed recited that "whereas



Joseph Thaw, by his will made the following devise, to wit:

“‘Item. I give and bequeath to my two children, Columbus and Columbia, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother; or if either of them shall (not) survive their mother, then I will that the surviving one shall have the whole.’

“And whereas their mother, after disposing of the real estate acquired by said will, and investing the proceeds in other real estate, died intestate, leaving said Columbus and Columbia her sole heirs at law. And whereas they having agreed to make partition of said real estate do execute this deed, and by which deed part of lot 4, square 427, was conveyed to said Columbia, and part of lot 9, square 370, was conveyed to said Columbus.”

The plaintiff's counsel objected to the admission of this deed in evidence, but the court overruled the objection and admitted the same.

The defendant then rested her case, and plaintiff was recalled as a witness in rebuttal, and testified, against the objection of defendant, that a part of the real estate left by his father was the homestead located on New York avenue, and that shortly before plaintiff became of age his mother and sister joined in a conveyance of the same to Mrs. Tyson, and his mother gave a bond that he should ratify the sale when he became of age, and he did so; that said property was sold for \$2,700, and out of the proceeds his mother purchased the two pieces of property described in said deed of partition, and that it was the New York avenue property alone which was referred to in said deed as having been disposed of by his mother, and plaintiff read in evidence, from the land records of said District, a deed dated December 6, 1850, from Eliza V. and Columbia Thaw to Rachel Tyson of lot 2 in square 251, on New York avenue, for an expressed consideration of \$2,700, and also the bond above referred to.

The statute under which the defendant claimed Mrs. Thaw to have been authorized to make sale of the infant's realty

was the Maryland act of 1798 (ch. ci, sub-ch. 12, sec. 10), which is as follows:

"And once in each year, or oftener if required, a guardian shall settle an account of his trust with the Orphans' Court; and the said court shall ascertain at discretion the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order: *Provided, nevertheless*, That no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court as well as of the Orphans' Court."

On the other hand, the plaintiff insisted that the only statute authorizing the sale of an infant's realty was embraced in sections 969-973 of the Revised Statutes of the District of Columbia.

Under the evidence the court instructed the jury to find for the defendant, which was accordingly done, and the case came to the General Term on exceptions.

F. P. STANTON and S. R. BOND for appellant:

1. Under the Maryland act of 1798, the proceedings shown were insufficient to divest plaintiff's interest, because such interest was an estate in remainder and not in possession. He had no possessory right until his mother's death; and, of course, the Statute of Limitations could not begin to run against him until that time. *Downin vs. Sprecher*, 35 Md., 474; *Nicholson vs. Caress*, 59 Ind., 39.

The Maryland act of 1816, sec. 13, 1 Dorsey's Laws, p. 646, expressly provides for sale of infant's reversion dependent upon an estate for life. Maryland Code of 1878, p. 656, sec. 14, contains a similar provision. So the act of Congress of 1856, 11 Stat. at L., 118; R. S. D. C., p. 113, sec. 969, etc., was passed to provide for the sale of a re-

mainder or reversion in real estate, and these acts treat the sale of such an interest as unprovided for either by the act of 1798 or that of 1843.

Also, because the requirements of the act were not complied with.

An act or decree of a court without jurisdiction is void and may be inquired into. *Bloom vs Burdick*, 1 Hill, 130; *Ex parte Lange*, 18 Wall., 163; *Sibley vs. Waffle*, 16 N. Y., 189; *Rockwell vs. McGovern*, 69 N. Y., 294; *Norment vs. Brydon*, 44 Md., 112; *Elliott vs. Piersol*, 1 Pet., 328; *Williamson vs. Berry*, 8 How., 495; *Windsor vs. McVeigh*, 93 U. S. 274.

There is no report on file of a sale by Mrs. Thaw, and no record of any of the particulars of such a sale, and no record of any consideration having been paid, not even a recital of it in the deed. 1 H. & J., 527; 3 Johns., 483; 16 Id., 47; 4 Mass., 135; 32 Me., 329; 6 Wheat., 119.

The defendant appears to rely upon the recitals in the deed, but they cannot bind the plaintiff. He was not a party to it and does not claim through it. *Hardenburg vs. Lakin*, 47 N. Y., 109.

2. The act of 1798 was repealed by act of Congress of March 3, 1843, entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia" (5 Stat. at L., p. 621; R. S. D. C., p. 112, sec. 957), providing that "The guardian of any infant may file a bill in the Supreme Court for the sale of such infant's real estate, or part thereof, when he shall think that the interests of his ward will be promoted thereby;" requiring that the infant shall be made a party defendant, an answer by him or a guardian *ad litem*, the taking of testimony, etc.

The terms of this act are broad, and clearly include such a sale of real estate as is provided for by section 10 of the Maryland act of 1798, which was, therefore, as to the sale of real estate, repealed by implication. *United States vs. Tynen*, 11 Wall., 88; *United States vs. Claffin*, 97 U. S., 546.

A similar act was passed in Maryland in 1816, amended by act of 1818, 1 Dorsey's Laws, pp. 644 and 693, and pro-

ceedings for the sale of infants' real estate in Maryland conform to that law and are held amenable to its requirements, although, like the act of 1843, it contains no repealing clause. *Hunter vs. Hatton*, 4 Gill, 115; *Williams' Case*, 3 Bland, 186.

W. E. EDMONSTON for respondent:

The will gave full power to Eliza Thaw to sell and dispose of the real estate left by the testator. *Clarke vs. Boorman's Ex'rs*, 18 Wall., 502, 503; *Second Reformed Presbyterian Church vs. Disbrow*, 52 Pa. St., 219.

The deed from Mrs. Thaw to Agricole Favier was accompanied and followed by possession under it for about thirty-five years prior to this suit, and its recitals therefore are evidence of the facts therein stated, especially in view of the lapse of time and of the state of the records and the nature of the proceedings therein recited. *Carver vs. Jackson*, 4 Pet., 88; *Whart. Ev.*, section 194; *Davis vs. Gaines*, 104 U. S., 398.

The evidence shows that the records of the Orphans' Court and of the circuit court were imperfectly kept and not well preserved; but after the great lapse of time since the proceedings mentioned in said deed were had, every presumption is to be made in their favor, and even separate papers, if coming from the proper custody, are to be admitted. *Stevenson's Heirs vs. McReary*, 12 Smedes & M., 9; s. c., 51 Am. Dec., 102; *Grignon's Lessee vs. Astor*, 2 How., 339; *Florentine vs. Barton*, 2 Wall., 210; *Mumford vs. Wardwell*, 6 Wall., 423.

Docket entries are evidence. *W. A. & G. Steam Packet Co. vs. Sickles*, 24 How., 333.

The failure of the guardian to account for the proceeds of sale could not invalidate the title of the purchaser. *Knotts vs. Stearns*, 91 U. S., 641.

The objection that the act of 1843 operated as a repeal of the act of 1798 is not a valid one. The act of 1843 has no express words of repeal. It was passed to meet a different condition of things. Its object was to enable a change of

investment to be made, not to procure means for support and maintenance. See *Doolittle's Lessee vs. Bryan*, 14 How., 566, as to implied repeal.

Neither the old circuit court nor this court ever held the later act to be a repeal of the earlier. On the contrary, the practice pursued under the former act, since 1843, has been adopted in very many more cases than before the said act of 1843.

The practice was never until very recently questioned. Both the bench and the bar gave it their sanction without question, for nearly forty years after the act of 1843 was passed, as they had done for about forty years before the act of 1843 was passed.

The proof submitted to the court in the trial below showed what the practice had been.

It was properly admitted. *McKeen vs. Delancy's Lessee*, 5 Cranch, 22.

The construction given to a statute by those charged with executing it is not to be overruled without cogent reasons. *United States vs. Moore*, 95 U. S., 763.

As to cotemporaneous construction and the mischiefs that would result from disturbing settled construction of statutes relating to titles. See *United States vs. State Bank*, 6 Pet., 39; *Doolittle's Lessee vs. Bryan*, 14 How., 567; *Jackson vs. Chew*, 12 Wheat., 161.

In *Grignon's Lessee vs. Astor*, 2 How., 343, Justice Baldwin, delivering the opinion of the court, said in reference to sales by orphans' courts and the decisions thereon:

"They are rules of property on which the repose of the country depends. Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own, and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of those courts, to whom the laws of the State confide full jurisdiction over the subject."

The objection that the act of 1798 did not apply to remainders is without support in authority or reason.

That act is general in its terms and uses the words "real estate" which have been considered in the case of deeds and wills to pass "remainders" as well as estates in possession.

The policy of the act of 1798 was to apply the property of the infant to his support. That act, as stated in the preamble, was intended to reduce into a system, among other things, "The laws and regulations concerning guardians and the rights of orphans;" and it was intended that the orphan who had a "remainder" should not starve or become a charge upon the public, any more than the one who had estates in possession.

Where the petition states the facts necessary to give jurisdiction, the purchaser need not look beyond the decree; and this rule is necessary to the repose of titles, especially in cases where there are defects in records. *Mohr vs. Manierre*, 101 U. S., 425.

Equitable estoppels are available in ejectment. *Dickerson vs. Colgrove*, 100 U. S., 578.

Mr. Justice HAGNER delivered the opinion of the court.

This is an action of ejectment to recover an undivided moiety of two lots in square 160 in Washington city. The plaintiff claimed under the will of his father, Joseph Thaw, admitted to probate in 1840, which devised all his estate, including these lots, to his wife Eliza V. Thaw, for life, in trust, to apply the income of the property to the maintenance of herself and their two youngest children, Columbia Thaw, and Columbus Thaw, the plaintiff. In the event of the death of the children, their interests were to devolve upon the widow, and upon her death the whole estate was to belong to the children equally. The widow died in February, 1866. Columbia Thaw in May, 1848, executed a conveyance of her interest to Agricole Favier. At the trial in the circuit court the plaintiff offered in evidence the will, and proved the foregoing facts and there rested.

The defendant claimed title through mesne conveyances from Favier. He had purchased the lots from Mrs. Thaw, who claimed the right to sell, under a decree of the Or-

phans' Court of the District of Columbia, of 29th March, 1844, which was "affirmed" by the circuit court, 12th October, 1844. Favier received from her a conveyance dated 17th March, 1848, which was not recorded until March 7, 1867.

To sustain this defence the defendant offered in evidence Guardian's Docket No. 2, Case No. 646, in the office of the Register of Wills, containing the following entries, viz.:

"Eliza V. Thaw, Guardian to	Bond, March 22, 1844, \$750. H'y Walker } Sureties. Jno. Walker, }
Columbia Thaw and Colum- bus Thaw, orphans of Jos. Thaw.	Trustee Bond, 17 May, 1845, \$750. H'y Walker, } Sureties." E. Walker, }

And the following entries contained in a book in the office of the Register of Wills, called a "scrap-book," and marked E. N. R., No. 2—Proceedings 1846 to 1861, viz.:

"Friday, January 21, 1848, sale of real estate Jos. Thaw, dec'd, filed, 'Order of approval for,' or 'Order of approval filed;'" and also read the two bonds referred to in the entries; which were the only papers in that court connected with the guardianship or property. She also offered to read from Chancery Rules No. 4, Case No. 344, of the late Circuit Court of said District, the following entries, viz.:

"Eliza V. Thaw, Guardian to Columbus and Colum- bia Thaw, infant children of Jos. Thaw, dec'd.	Petition Ext. Decree of Or- phans' Court. 1844, Oct. 12. Decree affirming decree of Orphans' Court."
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She also offered to read the only paper remaining in the Circuit Court referring to this case, which was a copy of the petition of Eliza V. Thaw to the Orphans' Court, asking for authority to sell these lots, and of the order of that court of the same date authorizing the sale, certified by the then Register of Wills.

To all this testimony the plaintiff objected, and it was admitted provisionally. The defendant then offered testi-

mony to show the disorderly condition of the records of the old Circuit Court, and of the Orphans' Court, before 1863; That Favier and those claiming under him had been in possession of these lots from about 1846, and had paid the taxes upon the property; and also offered evidence of the conveyances from Favier and through his grantees to the defendant. She then proposed to show what had been the practice in the Orphans' Court and Circuit Court for many years, by proof of the passing by those courts in numerous cases of similar decrees of sale of the real estate of infants; and thereupon the presiding justice overruled the objection to the evidence first offered as aforesaid and admitted the same with all the other proof. From this ruling, as to the admissibility of testimony, and to other rulings upon the prayers upon both sides, the plaintiff excepted; and the verdict being for the defendant, upon the instruction of the court, the present appeal was taken.

The case was argued at the close of the last session of the General Term, and the decision was reserved until the present time for fuller consideration, which it has received at our hands.

The admissibility of the evidence depends upon the question whether the Orphans' Court of the District of Columbia possessed jurisdiction to pass the decree under consideration. If it had the authority to decree the sale under the circumstances, we think the several items of testimony offered, disclosing different steps in the course of its proceedings, were admissible, notwithstanding the grave omissions and inaccuracies they disclose upon the authority of *Grignon's Lessee vs. Astor*, 2 How., 319.

The question of jurisdiction is therefore of controlling importance in the case.

It is insisted by the defendant that the authority was conferred by the terms of sec. 10, sub-ch. 12, of the testamentary law of Maryland, 1798, ch. 101, which is in force within the District of Columbia.

It will be proper to consider first, the state of the law in Maryland with respect to the powers of guardians and of



the Orphans' Court over the real estate of infants before the passage of that act.

It cannot be contended that any power to sell the lands of the ward belonged to the guardian *virtute officis*. Without the special authorization of a competent court any such attempt would have been justly punishable as an abuse of his office, and for any unauthorized diminution of his ward's realty he would be chargeable in exemplary damages.

The early legislation of Maryland constantly recognized this want of authority in the guardian to sell or diminish the real estate of the ward. At an early day it was provided that there should annually be called by the county court an "Orphans' Jury," to inquire "if any waste had been made of orphans' lands." 1715, ch. 19, sec. 33. It was further provided that the ward, on attaining majority, should be entitled to enter into all lands which had come into the guardian's possession by right of the ward, under penalty of treble damages for failure to yield possession. 1758, ch. 4.

The early statutes also required the maintenance of the ward from the income of his estate, alone, without any diminution of the principal.

By act 1715, ch 39, sec. 9, it was provided, that if the interest of his estate should be so small that it would not extend to a free education and maintenance of the orphan, he should be bound apprentice until twenty-one years, unless some kinsman or charitable person will maintain and educate him for the increase of his estate, "without any diminution of the principal, which shall always be delivered to him at his full age."

By the act of 1777, ch. 9, the office of Commissary General was abolished, and Orphans' Courts were first established in Maryland; but no authority to consume any part of the principal of the ward's estate was conferred until the passage of the act of 1785, ch. 80, sec. 9, which authorized the Orphans' Court to allow the guardian to apply a tenth part of the personal estate annually for his education.

In 1798, "The Testamentary Law," as it is called, was

passed, which was designed as a compilation and amendment of the existing laws and regulations respecting wills, administrations and guardianships.

The courts established by this act were to be composed of laymen. There was omitted even the provision of the act of 1777, which required that the judges should be selected from among the justices of the peace; the only qualification was that they should be "men of integrity and judgment." The new tribunals were to be, as they were sometimes called, the people's courts; and the cases where an educated lawyer ever occupied one of these offices, since the passage of that law may probably be reckoned on the fingers of one hand. Dr. Causin, the Orphans' Court judge who passed the decree under examination, was, at the time, a practicing physician, but was doubtless as learned in the law as any who had ever held the position in this District up to the absorption of the court in the present judicial system of the District in 1863.

Naturally the legislature appreciated the necessity of restraining the authority of courts thus constituted with a jurisdiction so obviously special and limited, within well defined bounds. In the words of the Court of Appeals of Maryland in *Scott vs. Burch*, 6 Harr. & J., 79: "To avoid the recurrence to incidental or implied authority, the powers of the Orphans' Court, both in relation to the subject matter of its jurisdiction and the forms of its proceeding, are declared with the most formal and precise minuteness."

But with the plain design of enforcing this purpose, so as to avoid all risk of its violation, there was added section 20 to sub-chapter 15, which declares that "the said Orphans' Court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by this act or some other law." With the same purpose it was declared by section 16, of sub-chapter 12, that "nothing in this act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trusts."

The controlling authority of these provisions has never

been disputed; but it may be well to refer to a few of the multitude of instances in Maryland, in which they have been enforced by the appellate courts.

Thus in 6 Harr. & J., above mentioned, in denying the authority of the Orphans' Court to revoke one of its previous orders, the court says: "Upon an examination of its provisions, the act of 1798, no such power can be found, and the exercise of such a power of revocation can only be countenanced by the doctrine of constructive authority; but recourse to such a principle is emphatically condemned by the express enactment of the statute."

So in *Spencer vs. Ragan*, 9 Gill, 482, the authority of the Orphans' Court to require executors to strike from the inventory property belonging to a petitioner was denied, because the statute had only expressly authorized this to be done upon the application of the executor or administrator.

In the same volume, p. 91, *Townshend vs. Brooke*, upon the ground that "they are tribunals confessedly special and limited in their jurisdiction, without any constructive or incidental power," the Court of Appeals denied the power of the Orphans' Court to order an administrator *ad colligendum* to pay counsel fees to the attorneys of the executors for resisting a *caveat*.

In *Lowe vs. Lowe*, 6 Md., 352, it was held on the same ground, that section 7 of sub-chapter 10, authorizing the Orphans' Court to order an executor to pay over a part of a distributive share or money legacy before final account, where the applicant is needy and the personal estate plainly sufficient to pay the debts, does not embrace the case of a specific legatee; because the section speaks only of "a legacy of bequest in money."

In *Taylor vs. Bruscup*, 27 Md., 225, an administrator applied to the Orphans' Court for an order requiring the sister of the intestate to produce his bank book. The statute authorizes an administrator, who believes that any person has concealed any portion of a decedent's estate to make such an application. The Court of Appeals held that as concealment was the ground of the jurisdiction, it should

be averred and established by the evidence; and that proof of mere withholding of property did not present the case contemplated; and hence that the Orphans' Court erred in passing such an order. The opinion quotes as applicable the language of Lord Coke from 2 Inst., 543: "These particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant." See *Conner vs. Ogle*, 4 Md. Ch. D., 452; *Norment vs. Brydon*, 44 Md., 112.

In *Brodess vs. Thompson*, 2 Harr. & G., 125, the plaintiff sued to recover the cost of buildings erected on the ward's land during his minority. The Orphans' Court had expressly ordered their construction, and prescribed their size and materials; and the excellence of the work and reasonableness of the charge having been certified to by sworn viewers, the guardian's account containing this charge was approved by the court, though in excess of the income of the estate.

The appellate court held that the power to exceed the income of the ward's estate was to be exercised only for his maintenance and education; and that the Orphans' Court had no authority to sanction the application of any part of the principal to the erection of new buildings.

Similar rulings have been made in this jurisdiction. Thus in *Mauro vs. Ritchie*, 3 Cranch (C. C.), 154, the court, after declaring that the Orphans' Court has no power to remove a guardian for any cause not pointed out in the statute, continued: "If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute." The Supreme Court in *Yeaston vs. Lynn*, 5 Pet. (30 U. S.), 230, questions the propriety of an act of the Orphans' Court in revoking the letters of an administrator, upon his failure to give counter security, because the power was not expressly conferred by the statute and all exercise of implied powers is forbidden.

Many other cases might be cited to the same effect; evincing as uniform a *consensus* of opinion upon this point as upon any other in the law.

We have no alternative but to respect this unbroken current of decisions; and we therefore hold, as the unquestionable rule of construction, that the power to order the sale of an infant's lands cannot be held to have been committed to the Orphans' Courts by the statute, unless it has been expressly given; and that no considerations of convenience to suitors or of supposed legislative intention, however strongly implied, will avail if it has not been so expressed. That court could no more justly claim such authority, in the absence of an express grant, than it could grant a divorce, or admit to probate a will not executed as required by law; or accept an administration bond, without security, because such was the wish of the deceased; or grant administration when the deceased was domiciled, or the *bona notabilia* sought to be administered were outside the boundary of the district, however near the dividing line. The unanswerable response to such applications would be: "The said Orphans' Court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by this act or some other law."

It is in the light of these principles that we are to examine the provisions of the act of 1798, ch. 101. The statute is a very long one, containing five sections, the third of which, for convenience, is subdivided into fifteen sub-chapters. The provisions referring especially to "Guardians and Orphans," are contained in sub-chapter 12, and the 10th section, under which the power to pass such a decree by the Orphans' Court is claimed, reads as follows:

"And once in each year or oftener, if required, a guardian shall settle an account of his trust with the Orphans' Court; and the said court shall ascertain at discretion the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the

ward, may allow the guardian to exceed the income of the estate, and to make use of his principal and to sell part of the same under its order; *provided, nevertheless*, that no part of the real estate shall, on account of such maintenance and education, be diminished without the approbation of the court of chancery or general court as well as of the Orphans' Court."

That part of the section which declares that "the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and to sell part of the same under its order," cannot be invoked as affording anything like an express power to decree a sale of an infant's lands. The provision plainly, by its terms, its context and the history of its origin and expansion, refers only to the personality of the ward. And such has been its uniform construction by the courts of Maryland. Thus in *Brodess vs. Thompson*, 2 Harr. & G., 126, the court says:

"The interest or income of a minor's estate is the fund out of which he is to be maintained and educated, and under no circumstances could be exceeded until the act of 1785, ch. 80, was passed. By the ninth section of that law, the Orphan's Courts are invested with authority to allow the guardian to apply a part of the personal estate, not exceeding a tenth part thereof, to the education of his ward. The act of 1798, ch. 101, in its tenth section of the twelfth sub-chapter, only enlarged this authority, by extending the expenditure to any part or the whole of the personal estate if necessary."

The twelfth section of the same sub-chapter is introduced, to prescribe the mode in which the guardian should carry into effect the power of sale where the personal property of a ward consists of specifics. The court must pass an order for such sale, specifying whether it is to be made for cash or on credit, and requiring the purchaser to give security, etc., and all the provisions in the statute relative to sales by executors, are expressly made applicable to such sales of personality by guardians.

It thus appears that where the statute designed to allow a diminution of the personal estate of the ward, it not only expressly conferred the jurisdiction upon the Orphans' Court to allow such diminution, but in express terms it authorized the court to allow the personalty to be sold for the purpose.

We would not expect to find in the statute a less explicit grant of authority to sell and diminish the real estate of a minor, if such a jurisdiction was intended to be conferred upon the Orphans' Court. Indeed, one would naturally look for greater explicitness in a grant of such an authority, when we recall the astonishing importance attached to the possession of land at that day and the exacting formalities then attending its transfer or incumbrance.

But the only expression in the law which is relied upon as creating such an authority in that court, is comprehended in these words in the tenth section, "Provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general courts, as well as of the Orphans' Court."

The remaining sections of the sub-chapter which have reference to the ward's lands, are framed with a cautious view to the strict accountability of the guardian, and differ but little from the previous stringent laws on the subject. The guardian is to have the realty reported on by viewers appointed by the court; he is strictly forbidden to commit waste on the land; but the court on application may authorize him to cut down and sell wood for the ward's maintenance and education; and stringent rules for the leasing or cultivation of the lands in one of the several modes specified in the law, are explicitly laid down for the guidance of the court and guardian.

And yet there is not a word throughout this comprehensive statute, the provisions of which frequently descend to details well nigh trivial in their minuteness, that gives the slightest direction or hint as to the mode in which the realty is to be sold; the machinery by which it is to

be effected, or the terms upon which the infant is to be deprived of what at that day was an important qualification to vote, and the indispensable qualification to hold high public office. The legislature that so cautiously guarded against the unauthorized diminution of the timber on the land, or its careless cultivation, could scarcely have designed that the houses and lands together might be struck off with fewer accompanying safeguards than surrounded the order to cut firewood on a corner of the farm.

Again, to have conferred such a jurisdiction upon the Orphans' Court would have been altogether unnecessary. There existed at the time, as there had done in Maryland from the earliest period, a tribunal of general jurisdiction, fully authorized to decree the sale of the real estate of minors.

In *Dorsey vs. Gilbert*, 11 Gill & J., 90, the court says : "It was an undoubted power of the court of chancery, before any of our legislative acts authorizing the sale of infants' estates, to convert the real estate of an infant into money ; and many cases may be found where the guardians of infants under particular circumstances have been authorized to make this conversion. The court of chancery, in the exercise of this jurisdiction, acted under a delegated authority from the king, who, as *parens patriæ*, had jurisdiction over the persons and estates of infants. The legislation of this State, in relation to the sale of infants' estates, is but a modification and enlargement of an acknowledged power. The property of the infant is not in any manner impaired or lessened, but a change in its character alone is effected, and that for his benefit."

And this principle, admitted throughout the decisions of the courts of that State, is reaffirmed in one of the last volumes of its reports, *Long vs. Long*, 62 Md., 80, in these identical terms.

Hence, in 1798, the guardian had the clear right to institute appropriate proceedings in a chancery court for the sale of his ward's real estate ; and out of the proceeds, when realized, the court had full authority to allow the



expenditure of part of the fund for his maintenance and education. But as the exercise of this authority of diminishing the fund in the chancery court might conflict with the pending administration of the ward's estate, thereafter to be more fully vested in the Orphans' Courts, the wise provision for insuring fidelity of accounting and preventing waste, was introduced into section 10; which, as we understand it, was designed to forbid the diminution of the proceeds of the land, after it had been sold in chancery or possibly by a guardian under a will, without the approbation, as well of the chancellor who might have decreed the sale, as of the Orphans' Court which already had the guardian's accounts before it and could better judge whether a necessity existed for diminishing the proceeds of the realty. The new restriction therefore might rather be considered as a limitation upon the pre-existing power of the chancery court, which was no longer to be at liberty, of its own discretion alone, to diminish the realty of the ward; and the purpose of the proviso would have been more plainly disclosed by changing the frame of the sentence so as to read that the chancery court should not thereafter diminish the real estate of the ward without the approbation of the Orphans' Court.

That the words relied on fall far short of an express grant of jurisdiction to order a sale of the real estate of a minor seems self-evident. That there is an absence of any necessary implication of such an authority even, seems also plain; and its possession by the Orphans' Court can only be sustained by the most liberal invocation of that "incidental power or constructive authority," which is so positively forbidden by this statute.

It is a circumstance entitled to great consideration, that during all the interval since the passage of the act of 1798, no reported case can be found in Maryland where the Orphans' Court has assumed to exercise such a power of sale. The only instance that has ever been relied on to the contrary is that known as Goltier's Case reported in a note to Williams' Case in 3 Bland, 200. But examination will

show that the relief sought there was not that referred to in sec. 10 of sub-chapter 12. It was not an application to diminish the realty at all, nor was it sought to sell the real estate of infants "for their maintenance and education," which is the only ground of whatever jurisdiction is recognized in that section. The guardian there did not ask that any part of the principal should be so applied, but he stated that the owners of eight undivided ninths had contracted to sell a mill and adjoining lands, provided the petitioner should be able to convey the remaining one-ninth interest of his children therein, for a price which he deemed advantageous; and he asked that he might be ordered to convey his children's interest to the purchaser. It was a prayer, in effect, for such a decree as the chancellor was authorized to make under sec. 12 of the act of 1785, ch. 72. The Orphans' Court declared its opinion that "the sale was for the advantage of the children and should be confirmed, and authorized the petitioner to execute the deed. The case was then laid before the chancellor, who did not profess to act under section 10 of sub-chapter 12; but under section 7 of that sub-chapter (the report of the case in that particular in Bland being incorrect, as appears from an authenticated copy of the proceedings which I have placed among the papers in the case). The precise text of the order is in these words: "Under power vested in this court by the act of 1798, ch. 101, sub-ch. 12, sec. 7, the above order of the Orphan's Court is approved."

This order seems as indefensible under the one section as the other, for the case is certainly an extraordinary one, even when it is viewed, as it should be, as a mere application to ratify a sale already contracted to be made; to change an investment, while preserving the *corpus* undiminished.

The most careful search among the records, and painstaking inquiry of the most learned and experienced of the distinguished judges and lawyers of Maryland have resulted in the conviction that no case has been heard of, where such a proceeding as the present was ever undertaken in that State. That Orphans' Courts possessed no power to order

a sale of lands and had no jurisdiction over real estate, was there regarded as an axiom, until the passage of the act of 1865, ch. 162, sec. 3, which for the first time intrusted to them concurrent jurisdiction with chancery to order the sale of the real estate of intestates, of limited value, upon appropriate proceedings specified in the act. Previously, the uniform language of the courts had been to the effect that "controversies with regard to real estate must be settled in another forum;" and that "the several acts of assembly, from which the Orphans' Courts derive their powers, restrict the action of those courts in cases of intestacy entirely to personal assets. None of them confer any jurisdiction over the realty." *Hayden vs. Burch*, 9 Gill, 82.

Upon this ground, and because the exercise of a power of sale of realty by an executor under express directions in a will, was outside of the duties which were intended to be regulated by the act of 1798, it was uniformly held by the courts that the money coming into the hands of the executor from such a sale of realty, was not covered by the testamentary bond, until it was expressly provided otherwise by the act of 1831, ch. 315. That the ordinary guardian's bond would not be answerable for the proceeds of land coming into the guardian's hand would appear to be equally clear; and it would seem to have been conceded in the present case, by the requisition by the Orphans' Court of a different and additional bond by Mrs. Thaw before she should make the sale, in which she is described as trustee under the decree, and is bound to the discharge of her duties in that capacity.

Although the entire proceedings, from the petition onward, assume and rely upon the Orphans' Court as the source of authority to Mrs. Thaw to dispose of the land, it has yet been ingeniously argued that, conceding there may have been some want of explicitness in the grant of power to the Orphans' Court to sell the real estate, still the present proceeding may be regarded as having received its effective strength from the act of the circuit court; that the power to sell was therefore communicated by the order of a court

possessed of ample jurisdiction to order a sale of an infant's realty; that the force of such decree could not be impaired by its approval by the Orphans' Court; and that it is quite unimportant whether the approbation of the Orphans' Court preceded or followed the action of the circuit court.

But if we were dealing with a proceeding which derived its original strength from the action of the circuit court as a court of chancery, its decree, in the absence of some statutory dispensation, could be valid only where there had been an observance in the progress of the controversy of those prerequisite conditions which are indispensable to the proper administration of justice.

Of these prerequisites, the most fundamental and familiar is, that no one should be condemned without a hearing; and this impregnable axiom should especially be maintained where a court of equity is passing upon the rights of infants, the most helpless class of its suitors.

The case of *Hunter vs. Hatton*, 4 Gill, 124, shows that a decree had been passed by a court of general equity jurisdiction to sell the real estate of a minor upon the petition of her guardian and next friend, alleging that a sale would be for her interest and advantage. The infant was not made a party to the suit. The act of 1816, ch. 154, prescribed the form of proceeding where the court was asked to decree on such an application. It contemplated that the infant should be made a party and that testimony should be taken in the usual mode. By the act of 1818 the court was directed, as a more satisfactory mode of proof, to issue a commission to freeholders to report whether the sale would be for the interest of the infant; and as this last act made no mention of summoning the infants, it had been assumed, in the case cited, that it was no longer necessary.

But the Court of Appeals held that as the later act contained no express repeal of the requirement as to the summons under the previous law, the decree to which she was not a party was invalid, and was not admissible in evidence against her in a suit brought by her to recover the land after she had attained age. The court says: "The objec-

tion to the evidence offered on the ground that the infant was not summoned and made a party to the proceedings before the court, for the sale of her land, is not an objection to the jurisdiction of the court over the subject matter of the petition, but rests upon the broad principle, both of law and equity, that, unless in cases where it is otherwise provided by legislative enactments, decrees and judgments of courts of law and equity are only binding on the parties to the proceedings on which they are founded, and those claiming under them." And after pointing out the necessity of the appointment of a guardian *ad litem* for the infant, and the duties which would have devolved upon him in the course of the controversy, the court continues: "To deprive them, the infants, of these privileges, would be entirely inconsistent with the whole policy of our legislation, which has ever evinced an anxious desire to throw around the rights of infants, to their real estates, every necessary and salutary safeguard."

Again: by the act of 1785, ch. 82, the court of chancery was authorized to decree the sale of the real estate of a decedent for the payment of his debts, where the personalty was insufficient.

In 1826 the old circuit court of this District passed such a decree, upon a creditor's bill brought against the administrator and the infant heirs. The land was sold, the sale ratified, and the purchaser received a deed, and was in possession in 1834, when the Supreme Court, on a bill of review brought in behalf of the heirs, declared the whole proceedings in the original suit invalid and annulled the decree and sale. The case, *Bank U. S. vs. Ritchie*, 8 Pet., 140, was decided upon grounds which the losing party doubtless considered extremely technical. In the opinion, Chief Justice Marshall first called attention to the fact, that although the court had appointed a guardian *ad litem* to answer for the infants, yet the person so appointed did not appear from the record to be a relative of the infants though their parents were living. "He was appointed," says the court, "on the motion of the counsel of the plain

tiff, without bringing the minors into court or issuing a commission for the purpose of making an appointment. This is contrary to the most approved usages and is certainly a mark of inexcusable inattention." "The infants' answer, though signed by the guardian, was not sworn to; and although the insufficiency of the personal estate is admitted by the administrator, it was not otherwise established by the proof, nor were the claims of the creditor established except by the admissions of the guardian." The court declared these omissions to be fatal defects in the proceedings, and says: "Independent of these special requisitions of the act it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points."

And in 1844, the Supreme Court, in *Shriver's Lessee vs. Lynn*, 2 How. 43, in setting aside a trustee's sale ratified by the chancery court of Maryland in 1813, because the land sold had not been embraced in the decree to sell certain other enumerated lands of the same owner, uses this apt language: "No court, however great may be its dignity, can derogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity. And so must a sale be treated which has been made without an order or decree of the court, though it may have ratified the sale." "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding."

Courts of justice are not at liberty to content themselves with the bare recognition of these principles and their mere repetition as amiable, legal platitudes; they have no alternative but to apply them effectively, where the facts justify their application.

Examining the proceeding before us, as though it had originated or were principally conducted and had received

its effective strength from the circuit court decree, we are to inquire whether there appears in the statute any dispensation of the usual and essential requirements to a valid decree in chancery cases. The answer must be in the negative, for there is not the slightest hint of any intention to interfere with the chancery procedure, as it should have been maintained in common justice and reason, and as it did in fact exist before the act of 1798.

And viewing this as a chancery proceeding, to be conducted according to recognized chancery methods, it is obvious there was a total disregard throughout, of all those safeguards, which in the cases cited were declared to be of such vital importance that their omission invalidated the decrees passed in their absence.

This petition was filed by Eliza V. Thaw, who, though spoken of in it as executrix, is not named therein as guardian. We have seen from the cases cited, 4 Gill and 8 Peters, that if she had filed it as guardian and next friend, it would still have been necessary that the infants should be made parties and summoned, and should answer under the oath of their guardian *ad litem* and that the case should be fully proved against them on an examination where they could be represented. But in the case before us there was no attempt to comply with either of these indispensable requirements. No notice whatever was given to the infants or to any friend in their behalf, from the beginning to the end of the proceeding; neither of them appeared in person or otherwise, and there is nothing in the case to show that the plaintiff was ever apprised of the proceedings until after he attained his majority.

The only intimation of anything like evidence having been adduced in the case is the statement in the copy of the decree of the Orphans' Court produced from the circuit court, that "on the petition, exhibits, accompanying proofs and representations of the said Eliza V. Thaw in her capacity as guardian and executrix," the sale was ordered. If any "proofs" did accompany the petition, beyond the exhibits and "the representations of the petitioner," there is nothing

to show that they were ever filed in the Orphans' Court, or transmitted to the circuit court, for nothing whatever was sent to the latter, except the copy of the petition and decree; and this copy is the sole evidence of their contents, and even that such a petition was filed or such a decree passed. That a chancery court could have regarded such a presentation of an application to sell an infant's land as sufficient in essentials of form or as supported by proper proofs to justify a decree, is inconceivable.

Again, the only possible ground upon which the sale could have been claimed under section 10, was that the income of the infant's estate was insufficient for his maintenance and education, and, hence, that it was necessary for those purposes that the principal should be sold and diminished. But the petition was not framed upon that theory and presented no such state of case; not a word appears there nor anywhere among the records of that court to show what the orphan's estate or income amounted to, or whether it was insufficient for the purposes indicated. Mrs. Thaw was tenant for life of the entire estate, the income of which she was authorized to apply for the maintenance of herself and the two children. Four years after the death of her husband she filed this petition, alleging that "The property of the deceased is insufficient to support her and the children provided for in the will," and praying that "The court will deem it expedient and cause the said lots to be sold for the purpose of relieving the immediate wants of the petitioner and for the support and education of the children." The decree, passed on the same day by the Orphans' Court, declared that "The guardian, for her minor children and herself, is authorized and empowered to sell," etc. These proceedings do not bring the case within the design of the provision of section 10. The principal object of the application was the support of the petitioner and to relieve her immediate wants; the needs of the children are certainly not the main purpose of the application, but they appear to be mentioned incidentally, rather than relied on as its object. Indeed the sale of the interest in remainder



of the children, in view of the age of the widow, who lived twenty-two years afterwards, could have contributed but to an insignificant extent towards their then maintenance or education. What the lands brought at the sale nowhere satisfactorily appears; and in the deed from Mrs. Thaw to Favier, dated March, 1848, and first placed upon the records in March, 1867, the consideration is stated as "the sum of — lawful money," etc. Nor is there a particle of proof throughout the case that the infants ever received any benefit, in any form, from what may have been realized by the sale.

The proceeding throughout appears simply as an application by a tenant for life to realize in money the value of her life interest in lands, and perhaps incidentally to place in some more profitable form of investment whatever might remain after the application of part of the proceeds to pay her own debts.

But the will, on its face, presented an insuperable difficulty that should have prevented a court of chancery from recognizing any authority in the Orphans' Court to interfere in the matter. The property is expressly left to the widow to hold during her life, "in trust for the equal benefit and maintenance of herself and of the two children," with remainders and upon conditions expressed with considerable pains, though with some confusion of language. With the administration of such a trust the act of 1798 expressly forbade the Orphans' Court to interfere. That an Orphans' Court should undertake to appoint a trustee, was a novel proceeding. The chancery court remained the sole tribunal where jurisdiction over property so circumstanced was to be exercised; and that court should not have undertaken the administration of the trust, upon a case so defectively presented and in absence of proof.

It seems clear to us then, that if the process had been inverted, and this application had been made to the circuit court in the first instance, that court could not properly have granted the relief prayed, in view of the manifold errors and imperfections of the proceeding. And since the Or-

phans' Court was without jurisdiction to decree, *proprio rigore*, we cannot believe that the united illegal acts of the two tribunals, each without competent authority, could together confer a lawful power of sale.

Nevertheless, the Orphans' Court did pass a decree and the circuit court did "affirm" that decree, according to the few words in the minutes, which authorized and empowered the life tenant, assuming to act as trustee, to sell the lands devised in remainder to the infant children "at public or private sale," "upon such notice by advertisement as she shall deem reasonable," for cash or on credit, at her option; and to execute to the purchaser "a valid deed of conveyance in fee simple of the premises, with all the right and estate therein of the said Columbia and Columbus Thaw, minor children aforesaid."

From this *ex parte* decree no appeal could have been taken. The only party to the proceeding, the life tenant, was content. She had selected the land she wished to sell; she desired prompt action from the court and she obtained it, for the decree seems to have followed instantly. The brief interval allowed by law for an appeal from an order of that court, in the nature of things, would long have passed before the minors would attain age or be competent to demand it; and if the decree was really "passed upon testimony of witnesses," then no appeal could be allowed unless the party should immediately notify his intention to appeal and require the testimony to be reduced to writing and sent to the appellate court within thirty days. Sub-ch. 15, sec. 18. A case resembling this in some of its features is *Holbrook vs. Brooks*, reported in 33 Conn., 349. Under the express authority of a statute the probate court ordered the sale by the guardian of an infant's land, in which, as in the case before us, the guardian had an undivided interest. His return to the court, very promptly made, set forth the particulars of the sale; and this was recorded by order of the court. The guardian then resigned and turned over to his successor in office the purchase money stated in the return; but passed no account of the ward's estate in the court.

Suit was brought upon the guardian's bond after the ward had reached the age of twenty-eight, in which it was claimed that the guardian's return had assigned to the ward less than the full value of her undivided interest in the land, and had reserved for his own interest more than he was entitled to. The defendant relied upon the conclusiveness of the action of the probate court in ordering the recording of the return; but the supreme court held that the order was merely ministerial, and was not an adjudication of the correctness of the report and that it could not be precluded from the pending inquiry by any action had by the probate court on that return. The opinion says: "A glance at the proceedings in this case will show the absurdity of the defendant's claim. The guardian made a return that he had sold the property—*bona fide* and for a fair price, if you please—for a certain sum, which return was recorded. Though required by law and entered of record, it was, nevertheless, but the naked declaration of the party in interest, not under oath and not subject to the usual tests of a cross-examination. The adverse party was not present and had no opportunity even to tell her own story; and the court, in no way or manner found the declaration to be true. To give such a proceeding the force of a judgment conclusively binding upon the parties, would sanction a manifest fraud in the present case, and open a wider door to fraud in the future."

Even if the Orphans' Court of the District of Columbia had been clothed by the statute with a special jurisdiction to decree such a sale, it would be essential that the jurisdictional facts should appear in the proceedings. 6 Wheat., 126. But the entire absence here of all proper action on the part of the guardian would render the proceedings obnoxious to the criticisms in the Connecticut case; for we find no entry on any record to show that the guardian ever passed any account with her wards, or that either court ever ratified the sale or had any information that it had been made, except the few words in the handwriting of the then Register of Wills, which one of his successors found among other loose slips of paper in an old portfolio in the office,

and pasted on the brown paper leaves of a scrap book, such as is used to preserve newspaper clippings.

If the plaintiff were in possession and the defendant had brought an ejectment, is it possible she could recover upon this evidence? We are of the opinion that the entire proceedings, from the filing of the petition, were grossly imperfect, irregular and unauthorized, and are ineffectual to divest the title of the plaintiff to the lands described in the declaration.

It has been urged by the plaintiff's counsel that the proceedings were still further illegal, because the interest of the minors in the lands sold were estates in remainder or reversion, and not in possession. But as we are of opinion the Orphans' Court was without authority to decree the sale of the real estate, in any event, it is needless to consider this point. Nor, for the same reason, can we hold that the act of Congress of 1843, March 3, operated as a repeal of a power of sale vested in the Orphans' Court by the act of 1798. As no such power was conferred by that act there could be no repeal of what did not exist.

But the observations we have already made as to the needlessness of conferring the power to sell the realty of infants upon the Orphans' Courts in 1798, in view of the plenary power then existing for that purpose in the courts of chancery, apply with double force to the present proceeding, commenced after the passage of the act of Congress of 1843, entitled "An act to provide in certain cases for the sale of the real estate of infants within the District of Columbia."

The legislature of Maryland from time to time had passed laws to regulate the exercise by the court of chancery of its admitted powers, with a view to the greater security of suitors, especially where infants were parties jointly interested in real estate. But no such regulations had been adopted in that State respecting the sale of real estate belonging to infants alone up to 1798; nor was there such legislation in Maryland until the law of 1816, the best features of which were incorporated by Congress in the act of 1843. This excellent statute from that time became leg-

islative instruction for the chancellor as to what should be required as proper safeguards wherever an application should be brought before him for the sale of an infant's real estate. It exacts a petition by the guardian, duly verified, stating all the facts, calculated to show whether the ward's interest will be promoted by a sale. It provides for all proper parties; for answers under oath by proper guardians *ad litem*; for answers in addition by such of the infants as are over fourteen; for commissions to be attended by the guardians *ad litem* for taking the testimony of disinterested witnesses; and for a decree only after it has been proved to the satisfaction of the court that the interest of the infant manifestly requires the sale of his real estate and that the rights of others will not be violated thereby. It protects the infant against the practices of the guardian by providing that he shall not become the owner of the land during the minority of the ward; and it prescribes the manner in which the proceeds shall be disposed of or invested; no *diminution* being allowable, of course, unless the Orphans' Court shall also give its approbation. If it were unnecessary in 1798 to apply to the Orphans' Court for an authority already possessed by the court of chancery, and unreasonable to abandon its settled modes of procedure to improvise unguarded methods in an inferior court; *a multo fortiori* was it worse than unreasonable, after the act of 1843, for a guardian to turn his back upon the ample safeguards and facilities afforded by that statute for the conduct of such an application, and resort to a procedure accompanied by as slight precautions for the rights of infants as could well consist with any disposition to guard their interest. It may have been deemed highly important by the tenant for life that she should, in as cheap and speedy a manner as possible, be enabled to sell her life estate in the lots disembarassed by the estate in remainder of the infants; but it was a manifest wrong to these children to expose their interest in the father's land to the certainty of sacrifice. Nobody could be in doubt as to which of the parties would be the loser by this mingling in one sale of these different rights.

The defendant insists upon defences which, it is claimed, are available, notwithstanding there may have been a want of jurisdiction in the Orphans' Court to pass the decree; and these remain to be considered.

The long interval since the sale, and the fact of ownership since that time by the purchaser and the subsequent grantees, is first relied on. But the possession by Favier and those claiming under him, with payment of taxes, etc., is not sufficient to defeat the plaintiff's claim if it be otherwise well founded. Columbus Thaw had no right of entry upon the property until after the death of his mother, the life tenant, in February, 1866, much less than twenty years before the impetration of the present action.

The supposed estoppel invoked against the plaintiff by the recitals in his deed to Little in 1871 cannot, in our opinion, be maintained. Neither the defendant nor her grantors were party to the deed. Such a recital can no more be invoked by a stranger against the plaintiff, than a recital to the contrary effect could be adduced by the plaintiff against the defendant. But the question is set at rest by the evidence set forth in the bill of exceptions, which is before us, free of objection. It shows, without contradiction, that the real estate referred to in the deed as having been disposed of by Mrs. Thaw and the proceeds invested in other real estate, was not the property involved in this suit, but was none other than the homestead on New York avenue.

Nor can we agree that the will of Joseph Thaw conferred upon his wife the power to sell and dispose of his real estate at her own pleasure. Neither the case of Second Reformed Presbyterian Church *vs.* Disbrow, 52 Pa. St., 219, referred to by the defendant, nor the other cases examined by us where a similar ruling was had, would support the contention in the present case. Here there is no devise of the property to the wife out and out. It is expressly given to her "To hold and enjoy during her natural life," *in trust* for the equal maintenance of herself and her children; and it is only in the event of the death of both the children, that it is "then"

given to her and her heirs. The provision which devises and bequeaths to the children all the estate real and personal that shall remain at and after the death of their mother, can be fully gratified by confining its application to the portion of the remaining personalty that had not perished or been consumed in its use; and this is more consistent with the rules for the construction of wills than to consider the language as repealing the reiterated declaration of the testator, that his wife was only to enjoy a life estate.

Finally, we have been earnestly referred to repeated decrees of the Orphans' Court, subsequently affirmed by the chancery court, ten of them between 1823 and 1844, and many others after that date, in which the existence of the jurisdiction to pass such decrees had been assumed; and we have been urged to respect this long-continued practice, and not to risk the disturbance of titles by a contrary construction.

We have been duly impressed by this consideration, and it has had great influence in our examination of the question of jurisdiction. The bare fact of the exercise of jurisdiction by a court has a certain weight, though no repetition of the claim to the authority can ever amount to proof that it is well founded. The judgment is still examinable by other tribunals, and if found to have been rendered without jurisdiction it will be treated as a mere nullity, as simply void, as a blank, as though it never had existed; for it is only the judgment of courts of competent jurisdiction that are held conclusive upon the parties or are entitled to respect as precedents. When the reviewing court has positively determined that the judgments in a certain direction are nullities for want of jurisdiction in the court that rendered them, it is unimportant what may be their number, for no accumulation of usurpations and errors can avail to establish jurisdiction in the entire series, if it does not exist with respect to each individual case. Even if we felt obliged by this judgment to overrule decisions made upon solemn argument and after mature deliberation (as

would be our duty if we were clearly convinced, after full examination, they were erroneous), we would be venturing upon no untrodden ground. When Chancellor Kent wrote, fifty years ago, he reckoned more than a thousand cases as overruled or doubted. The fourth edition of Greenleaf's *Overruled Cases*, claimed to have added fifteen hundred cases to the great number contained in the first publication of the work; and the increase has been manifold since that time. The Supreme Court, in 12 Wallace, in overruling its previous decision in the *Legal Tender Cases*, said: "It is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made." From 1821, the opinion in *Anderson vs. Dunn*, 6 Wheat., 204, was supposed to embody the correct law of that controversy; but in 1880 the same court, in *Kilbourn vs. Thompson*, 103 U. S., 168, denied its authority. There is probably no court that has not at some time overruled itself. In *Blimline vs. Cohen*, 8 Md., 147, the Court of Appeals determined that the court of common pleas of Baltimore city possessed no jurisdiction in cases of replevin, although it had previously taken cognizance of appeals from that court in such actions without questioning its authority. In *Callender's Adm'r vs. Ins. Co.*, 23 Pa. St., 474, the appellate court overruled the decision in *Ewing vs. Furness*, 13 Pa. St., 531, which had been given by the whole court, Gibson, Chief Justice, "on the authority," as that ruling was expressed, "of several decisions of this court directly in point." The opinion in the latter case concludes an interesting discussion of the doctrine of *stare decisis*; with these words of comment on the former decisions: "It is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law." And in a very recent case, the same court, in *York's Appeal*, reversed its decisions rendered in 1857, upon a most important point respecting the application of the Statute of Limitations. As we have received no authenticated version of the opinion in the State reports, we cite, only as argumentative, the following extracts from their opinion refusing a rehearing of the case,



which are published as correct: "It is far better when this court commits a blunder to correct it in a manly way than to imitate the ostrich by hiding our heads in the sand. \* \* \* That decision is but twenty-eight years old, and, as before stated, is not a rule of property. We now overrule it, and with it the other cases which have followed it. We restore the law as it stood before it was decided and reinstate the act of assembly."

In none of the suits to which we have been referred, is it claimed there was any decision or even discussion of this question of jurisdiction, or even an appearance by attorney or in person, to relieve them from an absolutely *ex parte* character, except in the cases of Little *vs.* Ingersoll and Mansell's Appeal. In the former, Columbia Thaw, after she had arrived at age and married, filed a bill to set aside all these proceedings in the Orphans' Court and to recover her undivided interest in these lots. The defendant insisted upon the sufficiency of the Orphans' Court proceedings, and also relied upon a deed executed by Miss Thaw, after her arrival at age, releasing all her interest in the land to Favier. The evidence failed to sustain her contention in reply, that she was a minor at the date of this deed. The justice below, in his opinion, affirmed his belief that the Orphans' Court had jurisdiction to render the decree; and in the decree he incorporates the "opinion" that the title to the lots is vested in the defendant and therefore dismissed the bill, with costs. The case went to the General Term on appeal and the decree below was modified by expunging so much of this ruling as affirmed the sufficiency of the defendant's title to the property. As far as this action went, it was a direct and intentional refusal to affirm the validity of the title under the Orphans' Court proceeding, although the General Term denied the right of the complainant to recover in the face of her deed of release, executed after she attained full age.

Mansell's appeal was from an order of the Orphan's Court authorizing a guardian to borrow money upon the real estate of the ward and secure the loan by deed of trust.

The case was then referred to the equity justice who refused to ratify the order, and certified the case to the General Term. That court's opinion, as expressed by Mr. Justice Olin, asserts that "The power to order the sale of an infant's estate, given to the Orphans' Court, subject to the approval of a court of equity, includes the power to mortgage, which is a conditional sale," and that since it is "agreed on all hands a court of equity may authorize a sale or mortgage, the assent by the Orphans' Court cannot invalidate the act of the chancellor;" and the decree approved of the order of the Orphans' Court. But it is apparent that the General Term based its ruling upon the assumption of the jurisdiction which is the subject of the present inquiry. Whether the result deduced from that assumption was correct or not, or whether the act of the Orphans' Court may be justified upon other grounds than those stated, it equally remains that the jurisdiction was tacitly assumed, and was not decided after careful argument and deliberation; and that there was practically no discussion whatever of the question now before us. In declaring, as we do, our conviction that this assumption was not well founded, we are, therefore, not called upon to dissent from a solemn adjudication after a deliberate examination by a court of last resort.

All of the other cases referred to seem to have passed, *sub silentio*, and were decreed *ex parte*, as matters of course, apparently without a word of controversy. They are therefore merely reiterated instances of a faulty practice by a court of limited jurisdiction, and the frequency of the usurpation only magnifies the wrong.

We see nothing in this repetition of errors that establishes any rule of property which will be disturbed to the public detriment by a return to a proper practice. This court has not hesitated to correct such errors in its own procedure when brought to its notice, however long continued. A practice has existed here for many years to refer an equity cause to the auditor instead of to an examiner to take testimony. In the cases of the Phoenix Ins. Co. *vs.* Grant this course was adopted, in accordance with this well-estab-

lished usage ; and the proofs taken under this reference with the accounts were before the General Term in 3 Mac Arthur, 48, upon exceptions. Objection was there made for the first time that it was improper to refer a cause to an auditor to establish in the first instance a fact put in issue by the pleadings, but that the testimony, at that stage of the proceedings, should first be taken in the usual way before an examiner. It was not controverted that the reference accorded with oft-repeated precedent, but the court, when the objection was thus called to their attention, did not hesitate to condemn the practice, reverse the decree, and turn back the litigation to the point where this error was committed.

How this method of making sale of an infant's real estate began in this District, does not appear. It commenced about the time of the faulty decree in *Bank vs. Ritchie*. It may be that the judge, or Registers of Wills, or both, at the time, may, before their appointment, have been citizens of States where such powers were by statute expressly conferred upon the courts of probate. Assuming the existence of the jurisdiction, the language of the act of 1798 would have been a sufficient invitation to its exercise ; and that which had its origin in inadvertence, was probably perpetuated through inattention, on the application of parties who wished to avail themselves of what they supposed to be a more speedy and economical mode of attaining their purpose.

It was not to be expected that the Register of Wills, whose powers under the old system of judges were very great, would be disposed to discourage a practice which threw into their hands profitable fees, that under another system would have been received by the clerk of the chancery court ; and their interests were thus directly involved in its continuance.

In this class of cases there is always very earnest insistence, by the party who fears to lose his case, upon the great injury which a departure from alleged precedents may inflict upon innocent purchasers, other than himself. The

courts will always be willing to protect this class of suitors; but their interests should not be preferred to those of innocent heirs. The purchasers are volunteers who invest with expectation of gain; adults who are able to inform themselves of the condition of the title which their interests stimulate them to acquire, and who have the power to indemnify themselves from loss by discounting the risk from the purchase money or by guaranties and warranty of title. They are under no obligation to purchase and are not presumed to do so until they have been satisfied as to the title they wish to acquire. They know that men not unfrequently have brought law suits and they are not too innocent to have heard the legal maxim,  *caveat emptor*. But the infant, whose property is to be sold, has none of these personal powers of protection. No little ceremony is observed in bringing the minor before the Orphans' Court that its guardian may be formally appointed; but this formality complied with, the child, in a case conducted as this was, would no more know that it was about to be deprived of its inheritance, without due process of law, than if it were at its play in another hemisphere.

People in these days seldom break into the possessions of others with a strong hand and hold them as by right of conquest. The claim is always under some color of title; and although the party in possession may defend under a judgment of a court possessed of ample jurisdiction to decree in a cause properly before it, his defence will be disallowed if there has been a want of such jurisdiction in the court to decree, however innocently he may have purchased property, the rightful title in which had not been lawfully diverted from the proper owners. 3 How., 760; *Stewart vs. Lessee of Hickey*; *Windsor vs. McVeigh*, 93 U. S., 277; *Earle vs. Turton*, 26 Md., 23.

That the legality of such reckless methods of dealing with the real estate of minors was never questioned during all this time, as is asserted, we find it difficult to realize. In this case, which is the only one with the facts of which we have been made acquainted there certainly is nothing to

show any acquiescence in the decree of the Orphans' Court on the part of the plaintiff. Favier, the purchaser from Mrs. Thaw, evidently entertained but slight confidence in the title he had thus acquired, for he hastened to obtain from Columbia Thaw a deed of release of her share as soon as she attained age, which he took care to have recorded many years before her mother's (trustee's) deed to him was placed on record. The brother and sister, during the year the mother died, brought a joint action of ejectment for the lands, which was afterwards dismissed, as the plaintiff testifies, by the attorney in the case without his consent or knowledge. Columbia Thaw afterwards instituted the equity suit as we have seen; and the plaintiff's prosecution of this action completes the proof that in this case at least the jurisdiction of the Orphans' Court has been persistently disputed.

Many of the numerous cases where courts of great distinction have overruled faulty decisions of long standing, involved principles and values infinitely in excess of any amount that may depend upon the present ruling; but those courts nevertheless declared, as we must, that apprehensions of troublesome consequences from a conscientious judgment cannot avail to induce a court to decide against its clear convictions. We suppose the effect of this decision will be much less extensive than the counsel for the defendant have persuaded themselves may follow the loss of their case; for the lapse of time and honest settlements with wards must have left few cases open to controversy. But however this may be, we adopt the reply of Chief Justice Dallas in *Smith vs. Doe*, 2 Brod. & B., 581, where a similar consideration was urged: "If principle and practice are at variance, practice must give way; and in this case as in others, if the mischief is extensive, the proper remedy, if such there be, must be sought for and applied elsewhere."

The question we have been considering relates not only to the propriety of this practice in the past, it involves the proper methods of procedure to-day and in the future in this class of cases.

If a guardian, in 1844, had the right to institute such a proceeding and obtain such a decree, the guardian of to-day has the same right to its fullest extent, and the court has no discretion to decline to entertain his application, for no legislation has intervened to impair whatever rights existed in 1844.

We believe no such authority existed then, and that none such exists now; and we shall therefore reverse the judgment below, and it is so ordered.

NOTE.—This case having been heard before two judges only, a motion was made for a rehearing before a full court, which was accordingly granted.

*See 16 D.C. 200.*

## CHARLES C. MEADS vs. WILLIAM B. HARTLEY.

EQUITY. No. 9690.

{ Decided February 5, 1886.  
The CHIEF JUSTICE and Justices COX and MERRICK sitting.

1. The equity side of this court has jurisdiction under the Maryland act of 1785 to confirm a contract made by a guardian for the sale of an infant's realty where, under a bill filed for such purpose, proof has been taken showing that the proposed sale would be for the advantage both of the infant and others interested in the land.
2. When filed, such a bill may be amended after answers put in and proof taken by adding parties and a prayer for alternative relief by a sale and division of the proceeds.

Hearing in General Term in the first instance.

## STATEMENT OF THE CASE.

This was a proceeding to require the defendant to comply with his contract of purchase of a lot in square 871 of this city by paying \$1,000, the balance of the purchase money, therefor. The only objection on the part of the defendant was, that he was advised that the proceedings in equity suit No. 9395 in this court were not based on authority of law; that the court had no jurisdiction therein so as to divest the title of the infant defendants, who had an interest in the lot in common with adults.

The bill in the last-mentioned cause—No. 9395—avers the interest of said infants, who alone are made defendants thereto; and that the complainant, the mother and guardian of said wards, had made a contract for the sale of the infants' interest, which she asks may be confirmed by the court.

Process was issued and served on said infants and they came into court, and a guardian *ad litem* was appointed.

Answer and replication were filed and testimony taken and the cause was submitted for a decree.

On inspection of the record, it was suggested by the court that the adult co-owners should be made parties.

Thereupon they voluntarily appeared, filed a petition, and, by consent of complainant and the guardian *ad litem*

for defendants, were admitted as additional parties complainant. An amendment was then made to the bill, whereby the alternative relief was sought of a sale and division of proceeds, under the first part of the act hereinafter quoted. This amendment was also consented to by the guardian *ad litem*, and thereupon the cause was again submitted and a decree made for a sale, under which the trustee reported a sale (the same mentioned in original bill), which was, after order *nisi* and due publication, finally confirmed, and a deed of conveyance duly executed by the trustee to the purchaser, who is the complainant in this suit.

The purchaser thereupon made a subdivision of said lot 5 and built three dwelling houses thereon, one of which he contracted to sell to the defendant herein for \$5,000.

The suit was based on section 12, ch. 72, Act of Md., 1785 (Thompson's Digest, 131), which provides (omitting unnecessary words) as follows :

"That in case any infant, &c., hath *or shall hereafter have* a joint interest, or interest in common, with any other person or persons, &c., in any lands, &c., and it shall appear to the chancellor, upon application of any of the parties concerned, and upon appearance of the infant, &c., and hearing and examination of all the circumstances, that it will be for the interest and advantage both of the infant, &c., and of the other person or persons concerned, to sell such lands, &c., the chancellor may order and direct such lands, &c., to be sold," &c.

"And if any contract hath been made for any lands, &c., *held as aforesaid*, for or on behalf of any infant, &c., which the chancellor, upon hearing as aforesaid, and examination into all the circumstances, shall think for the interest and advantage, both of such infant, &c., and of the other person or persons interested therein, to be confirmed, the chancellor may confirm such contract and order a deed to be executed, &c., and all sales and deeds made in pursuance of and agreeably to an order of the chancellor, in consequence of the above power, shall be good and sufficient in law to



transfer the estate and interest of such infant, &c., in such lands," &c.

The case was ordered to be heard in General Term in the first instance.

EDWARDS & BARNARD for complainant:

The act of 1785 is not repealed or affected by any subsequent act of Maryland, prior to the creation of the District of Columbia, or by any act of Congress since.

The act of Congress of March 3, 1843 (R. S. D. C., Sec. 957, *et seq.*), provides a general method for sale of infants' real estate, but does not, expressly or by implication, take away or change the power of the chancellor under the act of 1785.

The amendment of the bill, adding new parties and asking alternative relief, took nothing away from the case, and in no way affected the interests of the infants. It was but a step in the cause, to which the guardian *ad litem* had authority to consent with the sanction of the court; and the decree following such amendment is as binding on the infants as it would have been if new process had been issued and served on them after the amendment, a new guardian *ad litem* appointed and the testimony retaken. 1 Daniels Chancery Practice, 152, 153; Freeman on Judg'ts, secs. 126, 142, 151; Neale *vs.* Neale, 9 Wall., 1. The Tremolo Patent, 23 Wall., 527.

The court of equity, by its inherent power, acts as the guardian of the rights and interests of infants; and the jurisdiction in these cases is one so eminently proper and inexpensive that it has been upheld and favored whenever the case has shown it to be for the interests of the parties. Long *vs.* Long, 62 Md., 80; Dorsey *vs.* Gilbert, 11 Gill & J., 87. If a partition suit were necessary in all such cases, it would greatly militate against adults who might be interested with infants, and who could readily agree to an advantageous sale; and, on the other hand, infants are not apt to be the sufferers if they get as much for their interests as adults do; and costs of partition are saved to both.

The rights of all the joint owners, or tenants in common, are fully protected by this statute; and after all, it is only another mode of making a chancery sale to best advantage. Private bids might be received after a decree for sale; and in this proceeding a bid is made before suit is filed, or a so-called contract which is nothing but an offer, and cannot ripen into a sale without the approval of the court. It is only a different way of bringing the same matter before the court, and in every way the infant is fully protected.

The infants and their interests are all before the court by the original bill and proceedings, and if the court deems it best to bring other parties before it, by amendment or otherwise, before final decree is passed, it is a matter of no consequence to them.

Neither is it a matter of any moment by whom the so-called contract of sale, on behalf of the infants, is made, so it appears to be agreed to by the adult owners, and is for the advantage of all parties.

A different ruling than that now contended for by complainant would disturb titles to valuable property in this District, which have long passed as perfect; and ought not to be made without the clearest authority.

J. T. CULL for defendant contended:

That the act in question so far as it related to the confirmation of contracts made on behalf of infants, applied only to contracts for sale which had been made before the passage of the act; and that this construction was consistent with the language of the act. The words "held as aforesaid" in the second clause of said section referring only to the manner in which the property was held, and not to the time when held; and the word "hath" in said clause confined it to property "held as aforesaid" prior to the passage of the act, whereas in the first clause of said section the remedy there provided for was as to property so held, not only at the passage of the act, but that should be so held in the future—after the passage of the act. And that being its scope, the court had no jurisdiction by and

under the original bill and proceedings, and not having jurisdiction to the original bill could acquire none by the amended bill, which also was in effect rather an entirely new bill and not an amended bill, it being for different relief and under an entirely different state of facts. And that to this new bill there had been no new proceeding; but that by a *nunc pro tunc* order of the court the proceedings under the original bill had been made to apply to this new or amended bill.

Opinion of the court :

The court is of the opinion that the Special Term had jurisdiction over the persons of the infant defendants by the proceedings under the original bill, and that the amendments did not make a new bill, but were consistent with the relief prayed for in the original bill, and that the objections to the title made by defendant are unfounded.

The words in the statute "if any contract hath been made for any lands," &c., does not, in our judgment, refer to contracts made before the passage of the act, but refer to contracts which have been made at the time the remedy given by the act is applied for. When such contract has been made, and the matter brought to the attention of the court regularly, and proof taken showing that such proposed sale would be for the interest and advantage both of the infants and the others interested in the land, the court has authority under this act to confirm and complete the sale, and to order and decree a deed therefor.

The decree will be that the defendant accept the title tendered by the complainant, and that he pay the balance of the purchase money therefor in compliance with his contract.

MICHAEL McCORMICK

vs.

THE DISTRICT OF COLUMBIA ET AL.

EQUITY. No. 9,497.

{ Decided February 15, 1885.  
The CHIEF JUSTICE and Justices Cox and  
MERRICK sitting.

Equity will not interfere when the invalidity of a tax is perfectly apparent on the face of the proceeding, unless circumstances exist touching the levy of the tax which would render its enforcement oppressive, or would irreparably injure the party, or when the allowing it to remain until enforced, or attempted to be enforced, would throw a cloud upon the title.

So, where the record, as far as preserved, shows the tax to be valid, but the record of the intermediate proceedings had been lost or mislaid, chancery, on the allegation of their materiality, will afford relief by directing a discovery from the defendants.

Where the foundation is laid for a discovery in aid of a legal right, a court of equity will not only grant the discovery, but will proceed upon the discovery to administer relief.

Appeal from a decree sustaining a demurrer.

## STATEMENT OF THE CASE.

The complainant being the owner and in possession of a part of lot 12 in square 762, which he purchased on the 29th of July, 1873, as an innocent purchaser without notice, from Florian Hitz, then the owner and occupant of the whole lot, was notified, in February, 1885, by the authorities of the District of Columbia, of the existence of a tax lien certificate which had been issued against the property to defray the expenses of opening an alley, and that his portion of the property would be sold to satisfy the same unless it were paid. The certificate had been bought by the defendant, Sheckells, and was held by him as owner. This notice the complainant alleges to have been the first notice to him of any claim against the property, and he filed this bill praying an injunction and discovery and a cancellation of the tax certificate on the ground that the same had been issued without authority of law, and was therefore void and a cloud upon his title.

The several statutes governing the opening of alleys in the city of Washington are as follows:

Act incorporating Washington, May 15, 1820, Webb's Digest, p. 1, by which the corporation of Washington was authorized to cause alleys to be opened on the petition of property holders, provided the charges accruing thereby shall be first ascertained by a jury.

An ordinance passed November 4, 1842, required the surveyor within fifteen days to make a plat of the alley, showing the quantity of land in square feet taken from the different lots or parts of lots. Webb's Digest, 2.

Section 1 provided that on filing the plat a jury should be empanelled to ascertain the damage which may accrue to any individual.

Section 2 made it the duty of the mayor, after the return of damages had been made, to appoint three disinterested citizens to levy a tax equal to the amount thereof, together with other attendant expenses, "in just proportion upon the individuals whose property in the square may be benefited thereby, designating the lot or part of a lot for which they may be respectively taxed;" and it was made the duty of the collector to collect the same as other taxes are collected.

Under the provisions of the act of the 21st of February, 1871 (16 Stat. L., 419), the Board of Public Works succeeded to the powers and duties of the corporation of Washington, and by the 37th section of the act (sec. 77 Rev. Stats. D. C.), the Board of Public Works was authorized to repair streets and alleys and to do all other work intrusted to them by the legislative assembly or Congress.

By section 91, Rev. Stats. D. C., it was provided that all laws and ordinances of the corporation of Washington not inconsistent with that statute should remain in force.

On the 23d of August, 1871, the legislative assembly passed an act which authorized the Board of Public Works to condemn ground and open alleys upon the presentation of the plat of the proposed alley, accompanied by a petition of a majority of the property holders interested. 1 Legislative Assembly, 109.

This being the state of the law, the bill alleged that on the 31st of May, 1873, while lot 12 was one parcel and owned by Hitz, a petition was filed for an alley, and a jury empanelled which condemned a portion of this lot for that purpose. Whereupon, on the 7th of June, 1873, William Forsyth, surveyor, undertook to levy a tax against Florian Hitz as follows: "Florian Hitz, lot 12, 10,821 square feet; damages, \$653.25; benefits, \$1,306.45; tax, \$653.20."

That "three disinterested citizens" were not appointed to levy the tax, nor was any person appointed, but Forsyth without color of authority thus undertook to make the assessment.

That on the 27th of June, 1873, Forsyth undertook to revise that assessment and made a new assessment as follows: "Florian Hitz, lot 12, 11,057 square feet; damages, \$653.25; benefits, \$1,068.98; tax, \$415.73."

That on the 2d of July, 1873, a tax certificate was issued for this amount, of which the defendant, Sheckells, became the owner, and which certificate recites that the same is a lien on said property, the whole of lot 12.

That on the 21st of October, 1873, and after the complainant had become the purchaser of the easterly twenty feet of said lot, Forsyth wrote to George W. Beall, a clerk having charge of special assessments, in reference to this last-named assessment, as follows:

"Will you please change lot 12, alley, square 762, as follows:

"To Florian Hitz, of lot 12, 8,299 square feet; benefits assessed, \$802.34; taxable, \$149.09.

"To Michael McCormick, of lot 12, 2,758 square feet; benefits assessed, \$266.64; taxable for same amount.

"Very respectfully,

"WM. FORSYTH."

Which change was, as the complainant believes, thus made, and a new assessment was made as follows:

"Florian Hitz, of lot 12, 8,299 square feet; \$490.30 damages; benefits, \$639.39; tax, \$149.09.

"Michael McCormick, of lot 12, 2,758 square feet; damages, \$162.95; benefits, \$429.59; tax, \$266.64."

All of which was without authority of law.

That on the 29th of July, 1884, the defendant, Sheckells, surrendered the certificate issued on the 2d of July, 1873, for the whole tax against Hitz, and applied for and obtained two certificates in lieu thereof, one against Michael McCormick for \$266.64 on 2,758 square feet, and one against Hitz for \$149.09 on 8,299 square feet, less a deduction of \$50 before that time paid by Hitz; a copy of which certificate against the complainant's property is filed in this cause, and it recites that the same is a lien upon the complainant's portion of lot 12, and a sale thereof is now threatened thereunder.

That there is now no record of these proceedings remaining in the proper offices of the District of Columbia; that the award of the jury has disappeared, and there is no paper in the office referring to this matter except the letter from Forsyth, hereinbefore referred to, and the book on which the entry was made by the clerk, Beall; and for that reason a discovery is necessary and is prayed for, as to what award and finding was made by the jury, and as to what person or persons made the assessment, and by whose appointment and authority such persons undertook to act, and for all the actings and doings had and taken thereunder.

The defendants demurred to the bill on the ground that the assessments and certificate if void as alleged created no cloud on complainant's title, and therefore afforded no ground for the interference of a court of equity. The court below sustained the demurrer and complainant appealed.

H. H. WELLS for complainant:

The complainant's case rests primarily on the doctrine that the removal of a cloud upon the title to real property is a well recognized and established ground for equitable relief, even where the cloud is caused by an illegal tax. *Holland vs. Challon*, 110 U. S., 15; *Union Pacific R'y Co. vs. Cheyenne*, 113 U. S., 516; *Chapman vs. Brewer*, 114 U. S., 158.

But it is said that the case as made by the bill is of such apparent and manifest illegality, such an absolutely void and unauthorized procedure, that equity has no jurisdiction to relieve against it because it is not a cloud on the title.

The statute, however, declares what the effect of the assessment and certificate shall be—

“Until paid, the assessment and certificate shall remain and be a lien on the property on or against which they shall have been issued: “and further, that if not paid within one year the property shall, on the application of the holder of the certificate, be sold.”

Sec. 3, Act August 10, 1871, 1st Legislative Assembly, p. 31. Also 3d Legislative Assembly, p. 59.

This last statute, section 3 act of March 29, 1873, extends the time of payment, but has the same provision as to sales. In the Union Pacific Railway case, cited above, the court say at page 525:

“Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.”

And see Chapman's case, 114 U. S., 171.

The rigid doctrine, which has sometimes been applied, that the collection of taxes will not be restrained, does not apply to special assessments made by municipal authority, and it was so decided by this court in *R. R. and B Co. vs. D. C.*, 1 Mackey, 217.

“We are of opinion,” this court say, “that the general language used in the class of cases referred to, applies to taxes levied by the sovereign alone,” and cites and quotes with approval, *High on Injunctions*, 369; *State Railway Cases*, 2 Otto, 613; *Webster vs. Connors*, 51 Md., 395:

In 1873 this court, in *Harkness vs. The Board of Public Works*, 1st MacA., 121, decided, adopting the language of *Ward's case*, 16 N. Y., 519, that when the claim appears valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case for invoking the aid of the court of equity to remove it as a cloud upon the title.



And see *Alexander vs. Denison*, 2 MacA., 562.

In *Chapman vs. Brewer*, *supra*, decided in 1884, the Supreme Court goes still further, and says that the levy ought not to be enforced because it had no validity as against the rights of the plaintiff, and it throws a cloud on his title, leaving only one question to be considered, to wit: whether the papers supporting the defendant's claim are void on their face.

Sec. 700 Story's Eq. Juris., explains what is meant by the papers being void on their face, to wit:

"Where the illegality appears on the face of it, so that its nullity can admit of no doubt."

Applying that rule to this case, we have a certificate in due form, in strict compliance with statute, made by a competent authority, reciting that so much money is due and that it is a lien on the property, upon which the searchers of title certify in all cases on the production of such a certificate that the property is not free or unincumbered, but is subject to a lien for the specified amount.

The certificate and assessment are alleged in the bill to be the whole and entire record now remaining in the offices of the defendant, the District of Columbia, in relation to this pretended tax.

It is, we think, manifest that every fact and circumstance of illegality alleged in this case must be shown, if shown at all, "by extrinsic evidence, and that evidence depends upon oral testimony and upon a discovery by the defendants."

If it be urged that the absence from the record of the necessary facts required to show a compliance with the statute proves the proceedings to be void, we reply that the loss of the records and papers from the office only shows that they are not now there, but mislaid; and the presumption which the law indulges, that public officers properly discharge their public duties, tends still further to show that the record was once regular on its face.

Indeed none of the illegalities complained of appear on the record, but the record, as far as shown, is free from objection.

The following are illustrations of some of the presumptions allowed in favor of the acts done by public officers:

"A public officer, a collector of taxes, is presumed to have duly assessed and collected the taxes." *Hand vs. Columbia County Supervisors*, 31 Hun, 531.

"The presumption that a public officer has done his duty applies to an assessor of taxes." *Perkins vs. Nugent*, 45 Mich., 156.

"The presumption is in favor of the authority of a city officer to do a particular act which he has done, when it appears within the general scope of the duties peculiar to his office." *Kobs vs. Minneapolis*, 22 Minn., 159.

To the same point. *O'Hare vs. Blood*, 27 La. Ann., 57.

The general rule on the subject is stated in *Best on Evidence*, vol. 2, p. 630, sec. 354:

"There is a general disposition to uphold official, judicial and other acts, rather than to render them inoperative, and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, necessary to the validity of those acts, and by which they were probably accompanied in most instances."

Mr. Cooley states with great care the general doctrine as to the jurisdiction of a court of equity to grant relief in such cases as this, as follows:

"When, however, the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become purchaser, and the evidence to rebut this case may possibly be lost or be unavailable from death of witnesses or other cause, \* \* \* the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent." *Cooley on Taxation*, 543, and cases cited.

There are many cases, however, which ignore the distinction between proceedings void on their face for illegality, and proceedings which, though illegal in fact, are on their

face presumptively valid. Such cases, if they do not give relief on the ground of illegality alone, will give it on the ground that any sale of the land under proceedings which assume to be by authority of law, and are conducted by public officers empowered to make such sales, is such a cloud upon the title of the owner as he ought in equity to be relieved against, if the officers are proceeding unlawfully and have no authority in fact. *Cooley on Taxation*, 544; *Blackwell on Tax Titles*, 483; *High on Injunctions*, sec. 539.

COOK & COLE and H. E. DAVIS for defendants:

It would seem upon the well settled principles of the Supreme Court of the United States and of this court, that there is no jurisdiction in a court of equity to grant the relief prayed for in this bill upon the allegations therein contained. It is a bill praying the cancellation of a tax lien certificate on the ground of its illegality, and therefore is, as complainant contends, a cloud upon his title.

Now it is not sufficient to allege, in terms, that the certificate creates a cloud upon the title in order to give a court of equity jurisdiction, but the facts set out must show that a cloud does or will exist.

In *Davis vs. The City of Chicago*, 11 Wall., 111, the Supreme Court of the United States, speaking of what must appear in the bill in order to give a court of equity jurisdiction on the ground of "cloud on title," says:

"The assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity."

The same rule was laid down in *Ewing vs. City of St. Louis*, 5 Wall., 413, and again in the case of *Henewinkle vs. Georgetown*, 15 Wall., 547, and whenever the question has arisen in subsequent cases that court has held to this distinction. The allegations of the bill are such as show the complainant's case to be without this rule. All the way through the bill it is charged that the officers acting in the premises, in making the assessment and issuing the certificate, acted without authority of law. Now, the law authorizing the

assessment of the tax is referred to in the bill, and the question whether the officers had or had not the authority to assess the tax and issue the certificate, is one of law arising upon an examination of the statutes and comparison of them with the certificate. There is no necessity for going into extrinsic evidence to determine this. The invalidity of the tax is not predicated of any irregularity in the proceedings, but of the want of authority in the officers to do what they did do. If the allegations of the bill are true the certificate issued against the property is of no effect and void, and nothing more is required than an examination of the law to show this.

Mr. Justice MERRICK delivered the opinion of the court:

This was a bill filed for the purpose of restraining the holder of a certificate of assessment for a certain special tax, the District of Columbia, and its tax collector, from proceeding to sell the property for the non-payment of that tax. It has been undoubtedly the practice recognized in this jurisdiction, where the mere naked case of the levy of an illegal tax exists, and all the evidences touching the levy and the proceedings for making that levy are of definite record and accessible to the world, that relief in chancery has not been granted against the enforcement of the tax, because there was a complete and perfect remedy at law for the possessor of the property who might always defend himself successfully in an action at law against the enforcement of a tax which, upon its face, was illegal and void. We do not propose to disturb that practice by our present decision.

But the Supreme Court of the United States, in its latest ruling in the case of the Union Pacific Railroad Company against Cheyenne, reported in 113 U. S., at pages 525, 526, summarily states the jurisdiction of chancery in this class of cases in an extract from Judge Cooley's work on Taxation, to which they give their unqualified approval as a succinct statement of the rules of law applicable to the intervention of chancery to restrain the collection of an illegal

tax. And there they reaffirm the doctrine that while a court of chancery will not intervene where the invalidity of the tax is perfectly apparent on the face of the proceeding, unless other circumstances exist touching the levy of the tax which would render its enforcement oppressive or would irreparably injure the party, or where the predicament of the case is such that allowing it to remain until enforced or attempted to be enforced would throw a cloud upon the title of the party, thus creating a serious impediment to his just rights and the quiet enjoyment of his property. Those are the general principles.

Now the application of them to this case is this: There was, according to the allegations of the bill, a levy or an attempt to levy a special tax with a view to opening and improving an alley in a certain part of this city. The proceedings which were taken in respect of that, it is alleged, were illegal and void, and therefore there was no just tax laid and no just demand against the property. But at the same time it is alleged, as the foundation of the application to the jurisdiction of this court, that although those proceedings were irregular, yet so much of them as is preserved, to wit, the certificate in the hands of the holder of the assessment and levy of this tax, is presumptively and upon its face correct and creates a cloud upon the title, and that the intermediate proceedings from the commencement up to this apparently regular burthen upon the property have been by some casualty lost or mislaid, so that the parties are entirely without the necessary evidence as to whether the tax was legal or illegal, and of course without the necessary evidence to protect that property against the unjust assault and claim of the party holding this certificate of special assessment.

A part of his bill, and the gravamen of his bill, is that it is necessary for him, in order that he may have complete relief and redress against the threatened oppression, to have a discovery from the District of Columbia and from its collector and from the holder of the tax, of all the proceedings which were enacted in the progress of the levy, so that there

may be a full ascertainment and exact evidence presented accessible to all parties for the purpose of determining whether or not that tax, in point of fact, was regular and lawful.

These allegations present a case for relief within the broadest principles of chancery jurisdiction; based upon the ground of accident and the necessity for a discovery from the defendant for the protection of the plaintiff in his legal rights. And where the foundation is laid for a discovery in aid of a legal right according to the well settled principles announced by the Supreme Court of the United States (though more expansive of jurisdiction than the doctrine in England), equity will not only grant the discovery, but will proceed upon the discovery to administer relief to the party, so as not to subdivide the subject-matter of controversy and entail a multiplicity of suits and unnecessary expense and delay. *Rupee vs. Clark's Ex'rs*, 7 Cranch, 89.

In this case, although the first bill certainly was altogether defective and inartificial and did not present a proper case for redress in chancery, the amended bill states explicitly, as the main ground for applying to chancery, the necessity for a discovery of the evidence which no longer rests in record nor in the proper depositaries for the safe keeping of such muniments of title, and asks for such discovery and for relief consequent upon such discovery.

The court is clearly of opinion that this brings the plaintiff's case within the predicaments stated by Judge Cooley, and presents a proper case for the intervention of chancery in regard to the levying of an illegal tax and for an injunction in aid of his just demands. For these reasons the court reverses the decree below, overrules the demurrer, and remand the case for further proceedings according to the equity that may be developed between the parties.

SAMUEL S. SMOOT

vs.

JOHN H. C. COFFIN ET AL., Trustees of the Bank of Washington.

{ Decided February 15, 1886.  
{ The CHIEF JUSTICE and Justices COX and MERRICK sitting.

EQUITY. No. 9527.

1. A vendor of real estate, selling in good faith, is not responsible for the goodness of his title beyond the covenants in his deed, and where there has been no eviction by paramount title, equity will refuse relief. The remedy of the vendee is at law on the covenants.
2. A voluntary surrender of possession is not equivalent to an eviction by title paramount.

THE CASE is stated in the opinion.

PAGE &amp; HAZLETON for complainant.

WM. F. MATTINGLY for defendants:

The laches of complainant and the staleness of his claim are a bar to relief in a court of equity.

"Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing." Story's Eq., 529, 1520; New Albany vs. Burke, 11 Wall., 96; Sullivan vs. R. R. Co., 94 U. S., 806; Lansdale vs. Smith, 106 U. S., 391; 12 Am. Dec., 368, note; 54 Am. Dec., 130, note.

The above cases show that this defence may be availed of on a demurrer.

"A vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of his covenants in the deed, and the only remedy is at law on the covenants." Refeld vs. Woodfolk, 22 How., 327; Noonan vs. Lee, 2 Black, 508; Peters vs. Bowman, 98 U. S., 56; Rawle on Cov. for Title, 604, *et seq.*

"The temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, and clothe them with every imposing circumstance, is such as may cause a preponderance in favor of the rule,

that unless there has been a *bona fide* eviction, actual or constructive, the parties must be respectively left to pursue the remedies which they have originally provided for themselves." Rawle, 640.

Where there has been no eviction, actual or constructive, equity will refuse to entertain a bill for relief, either by way of enjoining the purchase money or *a fortiori* by rescinding the contract. Rawle, 679; Platt *vs.* Gilchrist, 8 Sand., S. C. R., 118; 2 Kent Com., 472.

The process adopted by the Bank of Washington for the transfer of its property and the continuance of its business, upon the expiration of its charter in 1844, was similar to that followed by all the banks in this District at that time. This identical method was decided to be legal by the Court of Appeals of Maryland in Merrick *vs.* Bank of the Metropolis, 8 Gill, 59.

Mr. Justice Cox delivered the opinion of the court.

The bill, in this case, in substance, shows that in the year 1871, the complainant purchased from Dr. William Gunton and others, among whom are the present defendants, professing to be trustees of the Bank of Washington, a large amount of property in this city for the sum of forty thousand dollars; that he received a deed from the trustees containing a covenant of warranty (whether general or special is not shown), and also a covenant of further assurance; that he made a cash payment of five thousand dollars, and gave his four notes for eight thousand seven hundred and fifty dollars each, payable at one, two, three and four years, with interest at seven per cent. with a deed of trust, in the usual form, to secure them; that he entered into possession of the property, and, in the course of time, expended about nine hundred dollars in improvements and paid about twenty-five hundred dollars on account of interest, which is a fraction over one year's interest; that he remained in possession of the property until the summer of 1885, which was fourteen years, and then the Bank of Washington caused the property to be sold under the deed of trust for default in the



payment of the purchase money. He had paid no money on account of either principal or interest except about one year's interest. He claims the aid of this court, and asks that the defendants, the present trustees, shall be required to refund to him the cash payment of five thousand dollars made by him with interest, and to surrender the notes given by him, upon the ground that he never received a valid title to the property. As to one piece of ground, out of a large number of pieces, he says that the Bank of Washington never had title. As to the other property, his position is, that the proceeding by which the Bank of Washington, like all the other banks in this District, on the eve of the expiration of its charter, transferred all its property to trustees to manage for the benefit of shareholders, was legally invalid and vested no title in their trustees, and consequently these trustees could pass no title to the complainant.

He does not allege that he has ever been evicted or threatened with eviction, or disturbed in his possession by any superior title, or, in fact, that anybody in the world claims any title to the property except himself. Nor does he aver that there has been any breach of the covenant of further assurance; that is, that he has ever demanded and been refused further assurance.

We are all aware that the covenant of warranty is not broken except by an eviction under paramount title, and that a covenant of assurance is not broken until a demand and refusal of further assurance. So that he does not aver a breach of either of the covenants of title in the deed. Nor does he give any explanation of his long delay in asking to have this contract of sale rescinded except that he has only now discovered the defect in the title. He does not show why he could not have discovered it on the day of his purchase as easily as he has done it now after being fourteen years in possession. But he plants himself almost entirely on the naked ground that the title received by him was defective.

There are several objections to this proceeding which have

been insisted upon in a general way, such as his failure to show (except as to one piece of property which he says was not the property of the Bank of Washington) any invalidity in the title and the manifest laches in making this application so late.

But there is one conclusive answer to the prayer of relief which relieves us from the necessity of commenting upon any of the others, and that is found in the general rule of law that where a sale of real estate is consummated by a transfer of title and the purchaser enters into possession under it, then, although he may discover a defect in his title, yet if he is not evicted or threatened with eviction and is in peaceable occupancy of the property, his only redress is to sue on the covenants of title contained in his deed, and he has no right to reclaim money that he has already paid, or to be protected from the claim for the rest of the purchase money.

Both of these claims are made here, viz.: to have the money refunded and to be relieved from further payment. I will cite from only one case under each head. In the case of *Refeld et al. vs. Woodfolk*, in 22 Howard, 318, the court below had virtually decreed a repayment of the purchase money paid. The whole of the purchase money had been paid, and it was discovered that some encumbrances were on the property at the time of the purchase and the court decreed that the vendor should pay them off. It was virtually a decree that he should repay the purchase money. On appeal in that case the Supreme Court says, p. 327:

"But circumstances may very materially modify the situation of the parties, and indispose that court to interfere between them, even in cases within the jurisdiction of the court. If the contract has been executed by the delivery of possession and the payment of the price, the grounds of interference are limited by the covenants of the deed or to cases of fraud and misrepresentation. 'The cases will show,' says this court, 'that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of defect of title,

there being no fraud or misrepresentation; and that in such a case he must seek his remedy at law on the covenants in his deed; that if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed.' Patton *vs.* Taylor, 7 Howard, 132.

"This rule, experience has shown, reconciles the claims of convenience with the duties of good faith. The purchaser is stimulated to employ vigilance and care in reference to the things as to which they will secure him from injustice, while it affords no shelter for bad faith on either part.

\* \* \* We have met with no case in which a vendee, in possession under a contract of purchase or a deed with covenants, has been permitted to reclaim the purchase money already paid, to be held as a security for the completion or protection of his title. The Roman law permitted the vendee to reclaim the purchase money in his hands, as security against an impending danger to the title; but denied a suit for restitution, after payment, for that cause. 'We must not,' says Troplong, 'hastily break up a contract which the vendor may at last be able to fulfill.' There is no analogy between the case in which the purchaser is allowed to retain the price as security, and that in which he would force the vendee to restore it for that purpose. Between the right of retention and that of restitution of the price there is the distance between the *statuo quo* and rescission."

And on the other head I refer to the case in 7th Howard, at page 159, Patton *vs.* Taylor, cited in the foregoing extract.

The same rule is enforced in the cases which were cited on the brief of the complainant's counsel from 1st and 2d Johnson's Chancery Reports of New York; and a summary of cases, under the same heads, will be found also in the note to page 604 of Rawle on Covenants of Title.

These authorities seem to us to dispose of the present case. There is, to be sure, in the bill, a somewhat ambiguous averment to the effect that this complainant surrendered posses-

sion of the property. That might, at first sight, seem to be an averment that there had been a rescission, by mutual consent, of the contract, but when pressed for an explanation on that point the counsel disavowed it. So that it amounted to nothing more than the fact that the complainant had voluntarily vacated his possession of the property, and it was intended to put him in the position of one who had surrendered all the benefits that he had received under the contract before seeking a rescission.

But there is no authority for the position that a man who voluntarily steps out of a property and vacates the possession is in the same attitude as one who has been evicted by title paramount. It is only in the latter case that a remedy can be sought for a defective title, and it is unnecessary to determine in this case how far a remedy can be sought in such a case. It is evident that the present case is not one of real or threatened eviction, and that the relief of the complainant, if he is entitled to any, is entirely on the covenants of title. We think, therefore, the demurrer must be sustained.

## SHOEMAKER ET AL. vs. CHAPPELL ET AL.

EQUITY. No. 9361.

{ Decided February 23, 1886.  
The CHIEF JUSTICE and Justices JAMES and  
MERRICK sitting.

1. Wherever in a deed there is a repugnant boundary, if there be enough in the other boundaries and residue of the description to show a repugnancy, to correct it, and to ascertain the true location of the land, the court, out of the four corners of the instrument itself, will make the construction by rejecting the incongruous portion of the description or reconciling it with the true description so as to make the deed operative.
2. A creditor having notice of a deed which contains in itself the elements of correction cannot put himself upon the ground of a *bona fide* creditor without notice of a title not recorded.

THE CASE is stated in the opinion.

W. D. CASSIN for complainants.

C. M. & H. S. MATTHEWS for defendants.

Mr. Justice MERRICK delivered the opinion of the court.

The case of Shoemaker and others against Chappell and others, was an application to reform certain deeds upon the ground that there was a mistake in the description of the property, and the application to the court of equity was resisted upon the ground that rights of creditors had intervened and there could be no correction of a mistake in a deed as against creditors.

There is no occasion to consider, in the decision of this case, how far a judgment creditor can insist upon his rights as paramount to the rights of correction of a mistake as between innocent parties, grantor and grantee, for value; for, in this case, it appears, by an inspection of the deeds of the plat of the property, which accompanies the deeds as exhibited to this court, and the statement of the party himself, that upon the face of the deeds there are inherent correctives. There is a maxim of the law with which all are familiar that "*falsa demonstratio non nocet cum de corpore constat*," and the application of the maxim to a prayer for the correction of a boundary results in this, that wherever there is a repugnant boundary given in the description of a property, if there be enough in the other boundaries and residue of

the description to show a repugnancy, to correct it, and to ascertain the true location of the land, the court, out of the four corners of the instrument itself, will make the construction by rejecting the incongruous portion of the description or reconciling it with the true description so as to make the deed operative and effective.

In this case, without going into the details of it here, by the plat which they have exhibited, it is manifest that the initial point of lot No. 1 as described, which is mentioned to be at the southeast corner of John W. Hays' property, was intended to be the northeast corner; for, while the description of the first of the two parcels mentioned in the deed which is before me, from Chappell to Cassin and Davis, starting from that point only connects itself by course and distance; yet the first observation to be made is that the party professes to grant a piece of property outside of the property of John W. Hays, and if the description in the deed of the first parcel be followed it would throw that piece of property entirely within the land of John W. Hays.

But the deed contains also, and in immediate connection with the description of the first parcel, a continuous description of the second parcel of land, and that takes hold of the description of the first parcel and connects and continues the description by referring to things which are known monuments and boundaries. It professes to run with the outline of an original tract which is a specific call, and then professes to run across to a county road and to run two courses and distances with the county road down to the place of the beginning of that tract and passing around to the first described tract. There you have known monuments, a fixed and accurate description which cannot be mistaken, which rescues the imperfect description as to the first part and applies it truly to the subject-matter upon the land.

So that, upon an inspection and comparison of the language of the deeds with the plats and the monuments upon the ground, it is manifest that the initial point, in the drafting of the deed by the conveyancer, was mistaken, and

he called it the southeast corner when he ought to have called it the northeast corner.

With the correction of that starting point all the parts are reconciled, and there is a collocation of the different boundaries and a correspondence with the fixed boundaries and monuments ascertained, and it is absolutely demonstrated what was the meaning of the parties. So that within the instrument itself the correctives stand, and the creditor, then, having notice of that deed had notice, of course, of the elements of correction which were in the body of the deed itself, and cannot put himself in resisting this application before the court upon the ground of a *bona fide* creditor without notice of a title not recorded, and claim the exception of a statute, if there be any such exception as applicable to a creditor under such circumstances, a question which the court does not mean to decide because it is not called for in the present instance.

But we all agree that the deed itself, having its own corrective under the maxim I have mentioned, is enough to justify the demand at the hands of the court, that a decree shall be given for the correction of the mistake and for conforming the deed and its recorded written description to the intention and design of the parties at the commencement.

The decree below granting the correction will be affirmed, and counsel will draw up a decree in conformity with this opinion of the court.

## THE WASHINGTON MARKET COMPANY

vs.

## THE DISTRICT OF COLUMBIA ET AL.

EQUITY. No. 6486.

{ Decided March 8, 1886.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. The act of Congress incorporating the Washington Market Company authorized it to use and occupy certain real estate, belonging to the United States and situated in the District of Columbia, for ninety-nine years unless its estate should be sooner determined, in the manner provided in the act. The same act also declared that the property of the corporation "shall be subject to assessment and taxation for all District and municipal purposes," and that the ninety-nine year lease "shall be taken and considered as a determinable fee." *Held*, that for the purposes of assessment and taxation the company's ownership of this property stood on the same footing with the ownership in fee of other property-holders.
2. A court of equity will not enjoin against the collection of an excessive tax where there is a remedy at law or remedy specially provided by statute. Nor will it, in any event, relieve against its collection, when the complainant has not paid or tendered payment of the amounts admitted to be due.

## STATEMENT OF THE CASE.

This was a suit in equity to enjoin the enforcement of a tax lien, claimed by the District of Columbia, upon the property of the complainant.

The bill was filed in the year 1878 against the District of Columbia, its then Commissioners, and the then treasurer of the United States; and it alleged that the United States was the owner of certain lands in the city of Washington known as Reservation No. 7, fronting on B, Seventh and Ninth streets; that by the act of Congress creating the complainant corporation, it was authorized and empowered to use and occupy said Reservation No. 7 for the period of ninety-nine years, unless its estate should be sooner determined in manner as in said act provided, whereby, as was claimed, the complainant became a tenant of the United States, possessed of only a limited estate in said Reservation No. 7.

The bill further alleged that, by virtue of an act of Con-



gress and an act of the legislative assembly of the District of Columbia, the Board of Public Works of the District of Columbia, whose successors the Commissioners of the District are, was authorized to improve the streets of the city of Washington, and it was provided that there should be assessed upon the property adjoining, and to be specially benefited by the improvement, a reasonable proportion of the cost thereof, not exceeding one-third, which sum should be collected as other taxes are collected; and upon default in payment of such assessment a certificate of indebtedness should be issued against the property aforesaid, to bear interest at the rate of ten per centum until paid, which assessment and certificate should remain and be a lien upon the property against which it might be issued, and on default in payment of the assessment for one year the property should, on application of the holder of the certificate, be sold and conveyed to the highest bidder at public auction.

In 1871 the Board of Public Works caused the streets about Reservation No. 7 to be paved, guttered and otherwise improved, and thereupon assessed the United States as owner of all the property adjoining the said improvement with the full cost thereof, which full cost was paid by the United States, "as fully appears in a certain official publication entitled, 'District Affairs, 1874, Governor's Answer, pages 419-420,'" and has never been repaid the United States nor has any demand for repayment been made.

Notwithstanding, the Board of Public Works afterwards made an assessment against the complainant for the improvement on B street, and on complainant's refusal to pay the same issued a certificate of indebtedness against the property of complainant in said Reservation No. 7 and deposited the same with the commissioners of the sinking fund, from whom it afterwards passed to the treasurer of the United States, their successor in law; and this certificate and the assessment upon which it is based constitute an apparent lien upon the property of the complainant. Substantially the same state of things exists with reference to the improvement of Seventh street.

The bill denounced each of the assessments and certificates as illegal under the circumstances, and excessive in amount; alleged a purpose of the defendants to proceed to sell the complainant's property for their non-payment notwithstanding; and prayed an injunction against such proposed sale and the nullification and cancellation of the assessments and certificates.

By the acts of Congress of June 19, 1878, and June 19, 1879, the Commissioners of the District of Columbia were directed to enforce the collection according to existing laws, of *all* assessments for special improvements, *provided*, that upon complaint being made to the Commissioners within a time specified. and by the parties interested, that their assessments were "*erroneous or excessive*," the Commissioners should revise and correct such erroneous or excessive assessment so complained of; and in case the same were found to be erroneous or excessive, the Commissioners were required to issue to the person entitled a drawback certificate for the amount thereof.

The District of Columbia demurred to the bill. The other defendants did not appear or answer, and a *pro confesso* was taken against them, which was afterwards made absolute, on the 2d day of April, 1879. On hearing of the bill and the demurrer of the District of Columbia, on the 6th day of October, 1885, the demurrer was sustained and the bill dismissed. The complainant appealed.

FRANCIS MILLER and HENRY E. DAVIS for the District of Columbia:

The act of Congress creating the complainant corporation by section 13 provides: "That the real estate herein described (Reservation No. 7) is hereby vested in the said corporation for and during the said term of ninety-nine years, or until a forfeiture of its rights and privileges by a breach of the conditions herein imposed on said company, and said estate shall be taken and considered as a determinable fee. The real and personal property of said corporation shall be subject to assessment and taxation for all

District and municipal purposes, in the same manner and to the same extent that like property in the city of Washington owned and possessed by individuals is liable to assessment and taxation." This leaves no room for doubt as to what it means.

The sole ground on which the complainant bases its claim that the assessments complained of are entirely illegal is, that the United States has paid the whole amount assessed in the first instance. But the official publication cited by the bill does not show such to be the fact. Moreover, the assessment against the United States, if an assessment was beyond the power of the Board of Public Works and void and the only valid assessment in the premises, was that against the complainant.

But even if such assessment against the United States was paid by it that does not relieve the complainant. That is a matter wholly between the United States and the District of Columbia. *District of Columbia vs. W. & G. R. R. Co.*, 13 W. L. Rep., 793.

As to the excessive amounts of the assessments alleged, the right of appeal therefrom was twice given by Congress (act of June 19, 1878; act of June 27, 1879); and the complainant having failed to avail itself of such right, it cannot now be heard to complain in another tribunal than that offered it.

And the bill does not tender the admitted proper amount of the assessments. This closes the door of equity to the complainant in the premises. *State Railroad Tax Cases*, 92 U. S., 575.

The defendants, against whom the *pro confesso* was made, were not necessary parties. The District is the real party in interest, and the bill was properly dismissed generally on the sustaining of the demurrer.

WILLIAM BIRNEY for complainant:

1. The tax lien certificates were improperly issued.

The assessments were to be upon "the property adjoining." The United States, as owner of the fee, was entitled

to pay the assessments, and having paid them the lien was thereby extinguished. Cooley on Taxation, 322, 323, and cases; Addison on Contracts, § 338, and cases; Abbott's Trial Ev., 800, and cases; Bennett *vs.* Hunter, 9 Wall., 326; Tacey *vs.* Irwin, 18 Wall., 551; Alexander *vs.* Dennison, 2 Mac A., 562.

2. The final decree, if granted at all, should have been limited in its terms to the defendant demurring.

The District Commissioners, successors to the Board of Public Works, and the treasurer of the United States, successor to the sinking fund commissioners, are the real defendants. The bill makes the District a formal party only and seeks no relief against it.

Mr. Justice JAMES delivered the opinion of the court.

The Washington Market Company filed its bill, alleging that the United States was first assessed for the cost of the improvement made along B street from 7th to 9th, in front of the property leased by the United States to the market company, and that the whole cost of that work was paid by the United States, upon assessments presented by the Board of Public Works, the predecessors, as it is said, of the Commissioners of the District of Columbia; that afterwards the market company was assessed, not for the whole amount, but for a part of the cost of the same work. It was claimed that the demurrer to the bill admitted that the full cost had been since paid for this work by the United States, and that that payment extinguished all liability of everybody for the work.

The bill, however, in stating that the whole cost had been paid, referred to what was known as the "governor's answer," naming the pages, not as evidence, in the language of counsel for the complainant, but really as a part of the allegations of the bill. And when we turn to the report or answer so referred to, we do not find that the United States was really charged there with ever paying the full cost of the work on B street from 6th to 14th street, but that one

of the items shows that only five-sixths of the cost was charged to the United States, and that a balance corresponding exactly with the amount now charged to the complainant was left unpaid.

It is true that it does not appear from that table or statement of account, thus referred to and incorporated in the bill, just where that pavement lay, whether it lay in front of the property from 7th to 9th streets or not. But it appears that the full cost of the work was not charged to the United States, so that the bill does not show, taking the incorporated portion of the "governor's answer," together with the general allegation of the bill, a case of payment in satisfaction of the full costs by the United States, whatever the effect of that might have been had it been proved.

It is also objected that these proceedings doubled the assessments; that the assessing power was limited to but one assessment, and when that was done the power was exhausted; consequently the subsequent assessment was a nullity. But from what we have said there does not appear to have been two assessments for the same work, and the objection therefore must fail because based upon an erroneous statement of fact.

The third ground of complaint was that the complainant company was not liable to be assessed upon its leasehold; that the law subjecting the adjoining property to assessment, had reference to the ownership in fee, and not to a leasehold. But the statute declaring that the property of this corporation "shall be subject to assessment and taxation for all District and municipal purposes," also declares that this ninety-nine years lease "shall be taken and considered as a determinable fee." The meaning of that is, that for the purposes of assessment and taxation the company's ownership in this property stands on the same footing with the ownership in fee of all property adjoining the line of improvement. It does not matter what the case may be at common law, it is enough that the legislature has said that for the purposes of taxation (for we take the two acts to-

gether) it shall be regarded as that class of property which is assessable and subject to assessment.

This corporation, then, holds a property liable to be assessed, and liable to be sold in case of non-payment, where improvements are made along this street, and as it appears that the assessment made against it was not for the work which was paid for by the United States—in other words that there was no double assessment—the debt is consequently not discharged. It is true enough that where a stranger comes in and undertakes to discharge the very debt of a debtor it is discharged; so, too, where a stranger makes a payment of taxes for the purpose of satisfying them, they are satisfied. But that does not appear to be, in matter of fact, the case before us.

The result, then, is that this company is liable for these taxes. Nevertheless, we are asked, even in that event, to restrain the collection of them on the ground that they were excessive. Well, if the tax is excessive there is a remedy at law, and, in addition, there was a special remedy provided by the statute for having the excess corrected. The complainant cannot, therefore, come into a court of equity for an injunction.

But whatever its rights may be in that respect, it certainly cannot come here and ask us to enjoin against the whole tax without having paid that part which it admits would be due, if anything at all is due. We have held that something appears to be due, and it admits what the amount of it would be, if it be due at all. Certainly, then, it cannot seek equitable relief here without having paid what is due—what is in fact admitted to be due. We think the demurrer on the part of the District should be sustained.

A certain embarrassment, however, was thought to be presented to us in the state of the record. The Commissioners then holding office did not answer, and decrees were taken against them *pro confesso*, and afterwards those decrees were made absolute. So that the persons who represented the District and whose business it was to see to the collection of this tax, had their hands tied up by an abso-

lute decree while the District itself stood demurring to the bill. It was said that the District is an immaterial party and might have been left out. But the District is the very party whose business it is to collect these taxes, although they may be handed over and put into the National Treasury. It is the very party to resist this bill. The Commissioners are but the instrumentality. So that we find no embarrassment in the fact that those decrees were made absolute. That was a part of the law of the case, and the case was in court completely, notwithstanding those decrees were made absolute against those particular persons. It is true that the decrees went further and enjoined their successors in office, but the case is in our hands and cannot be taken out of them by any such accident as that. It strikes us as probably an oversight that those decrees ever came to be made absolute in such a state of the case, and it would seem to suggest to us the propriety of watching very closely in regard to whom we should make a decree *pro confesso* absolute.

We affirm the decree below sustaining the demurrer and dismissing the bill.

HEWETT ET AL.

vs.

WESTERN UNION TELEGRAPH COMPANY AND THE DISTRICT OF  
COLUMBIA.

{ Decided March 8, 1886.  
The CHIEF JUSTICE and Justices JAMES and  
MERRICK sitting.

EQUITY. No. 9451.

1. The first and cardinal rule in the interpretation of a statute is to look to the statute itself, its meaning, scope and object; and if, upon the face of it, the intention of the legislature can be gathered, those incidental rules which are mere aids to be invoked where the meaning is clouded, are not to be regarded.
2. The joint resolution of Congress of March 8, 1863, regulating the construction of telegraph lines in the District of Columbia, does not limit or control in any way the act of Congress of July 24, 1866, authorizing the extension of telegraph lines over the postal roads of the United States. The provisions of the latter act apply to and include the District of Columbia to the same extent that they do any other portion of the United States.
3. A public nuisance cannot arise from the exercise of a right granted by authority of law; but if the grant be not exercised with a due regard to the rights of the citizen, a private nuisance may be created.
4. Whatever the rule of law may be in other jurisdictions, the law as declared by the Supreme Court of the United States must govern and control this court.
5. On an application for injunctive relief against an alleged private nuisance growing out of the exercise of a right granted by the legislature, a court of chancery will consider all the circumstances and equities of the case, and where, as a consequence of its interference, the hardship upon one side would be immeasurably greater than the injuries sustained by the other it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law.
6. Facts stated which the court does not consider make such a case of private nuisance as entitle the complainants to a decree enjoining a telegraph company from erecting poles and stringing wires thereon along a public street and in front of complainants' property.

Appeal from a final decree at Special Term making perpetual a preliminary injunction. Decree reversed.

## STATEMENT OF THE CASE.

The object of this suit was to restrain the erection of a line of overhead telegraph wires on the east side of Seventh



street, between New York avenue and Boundary street, proposed to be constructed by the Western Union Telegraph Company, in connection with a new system of underground wires in this city, under a license or permit granted by the Commissioners of the District of Columbia, on May 11, 1885, and to compel the cancellation of that permit.

The ground of the jurisdiction invoked by the original bill was that the telegraph line complained of would constitute, if erected, a public nuisance, restrainable by injunction.

It was a bill by several private individuals alleging that they were owners or lessees of real estate on the east and west side of Seventh street, and appearing in the character of public prosecutors to restrain, as stated, an alleged threatened public nuisance. Subsequently the complainants, by leave of court, filed an amended bill which, in addition to the other matters alleged in the original bill, contained a series of allegations as to the special damage which it was contended would ensue to them and others similarly situated from the erection of the proposed telegraph line on Seventh street. The court below granted a preliminary injunction, and on final hearing it was made perpetual. The defendants appealed.

WILLIAM A. COOK, H. E. DAVIS, WARREN C. STONE and OSCAR NAUCK for complainants:

The parties here consist of owners of real estate on Seventh street northwest, in the city of Washington, between M street and Rhode Island avenue northwest. This brings them between New York avenue and Boundary, the points between which it is represented in the bill, it is proposed by the defendant, "The Western Union Telegraph Company," with the consent of the District of Columbia, to erect telegraph poles.

The right of different parties to unite in a bill cannot be well disputed. "Where several persons are injured by a common nuisance, although varying in degree, but having a common effect, they may join in a bill for an injunction, but there can be no recovery of damages." Wood's Law of Nui-

sances, 2d ed., sec. 791; *Brody vs. Weeks*, 3 Barb. (N. Y.), 157; *Veck vs. Elden*, Sandf. (N. Y.), 126.

Whatever injuries may arise from the erection of telegraph poles, or whatever rights may be affected by their erection must necessarily be special. It is proposed to erect such poles on Seventh street northwest, in front of and adjoining the property of the complainants, and they are residents and owners of real estate adjoining the part of the street on which it is proposed to erect the poles. It follows that as such residents the wrong or injury must be special and not such as is common to the public generally or to all the citizens of the District, and this is sufficient to sustain the bill as filed. *Wood's Law of Nuisances*, 2d ed., secs. 645, 648, 681; *Garitee vs. Baltimore*, 53 Md., 422; *Commissioners vs. Long*, Parsons, vol. 1; *Select Cases in Equity*, 143; *City of Georgetown vs. Alexandria Canal Co.*, 12 Peters, 98-9.

The right to the unobstructed use of a street or highway is a sufficient ground for an injunction, if it be to any extent or in any manner interfered with or disturbed (without proper legal authority). Such interference or obstruction becomes a nuisance. *Wood on Nuisances*, 2d ed., secs. 248, 249, 250; 2d *Dillon*, sec. 661; *People vs. Vanderbilt*, 28 N. Y., 396; *Webb vs. Portland Manufacturing Co.*, 3 Sumn., 189; *Davis vs. Mayor, &c., of New York*, 14 N. Y., 506; *Commonwealth vs. The Pittsburg & Connellsville Railroad Co.*, 24 Penn. State Rep., 159.

"Legislative sanction directly given or mediately conferred through proper municipal action is necessary to authorize the use of streets for the posts of a telegraph company; if such posts be erected within the limits of a street or highway without such sanction they are nuisances, but if the erection be thus authorized they are not. *Commonwealth vs. Boston*, 97 Mass., 555; *Regina vs. Telegraph Co.*, 9 Cox Cr. Cases, 174, cited in *Redfield on Carriers*, sec. 594, and note, where leading opinion of *Compton, J.*, is given; *Young vs. Yarmouth*, 9 Gray (Mass.), 386.

Among the additional cases more or less pertinent are the

following : The case of *Dusenbury vs. Mutual Telegraph Co.*, 11 Abbot's New Cases, 440 (S. C. of N. Y.); *Metropolitan Telephone Co. vs. Caldwell Line Co.*, 50 N. Y. Sup. Court, 448; *Little vs. The Bush Illuminating Co.*, 50 N. Y.; *Tiffany vs. The U. S. M. Co.* (Daily Register), Special Term N. Y., April 9, 1884.

The act of 1866, while general in its terms, contains no repealing clause, and it cannot be well maintained that in the absence of a special repealing clause, it in any way affected the special resolution of March 3, 1863. The repeal of statutes by implication is not favored. The latest utterance of the Supreme Court upon this subject will be found in 106 United States, *Redrock vs. Henry*, 596, in which case Mr. Justice Wood delivered the unanimous opinion of the court.

The joint resolution of 1863 from its very terms is special; it is confined to the District of Columbia; and the rule is clearly established that "the provisions of a special charter or a special authority derved from the legislature are not affected by general legislation on the subject; the two are to be deemed to stand together, one as the general law of the land, the other as the law of the particular cases. *State vs. Stall*, 17 Wall., 425; and in *Townsend vs. Little*, 109 U. S., 504, it is held "the terms of a special act control those of a general act."

The power or privilege conferred on the telegraph companies, either by the act of 1866 or the resolution of 1863, is not absolute, but carefully restricted.

These statutes must be construed strictly. In 2d Dillon on Municipal Corporations, section 657, it is said: "Statutes legitimating acts and obstructions upon the highways, which otherwise would be nuisances, are strictly construed and must be closely pursued; and the authority given must be exercised with proper care." Angell on Highways, sec. 237; *Stormfletz vs. Turnpike Co.*, 13 Penn. St. Rep., 555.

Guided by this rule of construction, can there be any doubt that whatever power or privilege is conferred upon the defendant exists subject to the antecedent and perhaps un-

alterable rights of the complainants to the unrestricted, uninterrupted and continuous use of Seventh street, agreeably to the plan of the city, and for the purposes for which it was accepted from the original proprietors and established by the United States.

J. HUBLEY ASHTON and NATHANIEL WILSON for the Western Union Telegraph Company and A. G. RIDDLE for the District of Columbia :

1. The original bill was an undisguised attempt to enjoin this work solely on the ground of public nuisance.

That, of course, could not be done in the face of the settled principle that a public nuisance is a public offence, and the fact that as neither the United States nor the District of Columbia complained of the work, there was no party on the record who had the right to invoke the jurisdiction of the court in such a case.

The bill was accordingly amended; and in the 14th paragraph the parties set up certain special and irremediable injuries which they pretended would ensue to them from the erection of the alleged public nuisance.

The principle is well settled that in all cases of this sort courts of equity will grant an injunction only where the facts alleged are made out upon determinate and satisfactory evidence. For if the evidence be conflicting, and the injury doubtful, that alone will constitute a ground for withholding this extraordinary interposition. Story's Equity, 12th ed., sec. 924, a; *Georgetown vs. Canal Co.*, 12 Pet., 98; *Irwin vs. Dixon*, 9 H., 10; *Wheeling Bridge Case*, 13 H., 567.

The principles applicable to suits by private individuals in cases of public nuisances are shown in the following cases: *Sparhawk vs. R. R. Co.*, 54 Penn., 423; *Hinchman vs. R. R. Co.*, 17 N. J. Eq., 75; *R. R. Co. vs. Prudden*, 5 C. E. Green, 530; *Davis vs. Mayor*, 14 N. Y., 506; *Osborne vs. R. R. Co.*, 5 Blatch. C. C., 368; *Dana vs. Valentine*, 5 Met., 118; *Fritz vs. Hobson*, High Court of Justice, 1880 (reported with note in 19 Am. L. R., N. S., 615.)

2. The United States possesses an unqualified fee in and are the unconditional owner of the streets of the city of Washington, and may lawfully dispose of the land to private persons or otherwise convert it to any use whatever. *Van Ness vs. The Mayor*, 4 Pet., 232; *Steamboat Co. vs. Steamboat Co.*, 109 U. S., 681; *Barnes vs. The District*, 91 U. S., 540.

3. Seventh street northwest from New York avenue to Boundary street and all other streets and avenues in the city of Washington are declared by Congress to be post-roads of the United States. Sec. 3964, R. S. U. S.

By the act of March 1, 1884, ch. 9, all the streets and roads in the District of Columbia are declared to be post-routes or post-roads of the United States.

That act is entitled, "An act making all public roads and highways post-routes," and provides "that all public roads and highways while kept up and maintained as such are hereby declared to be post-routes." 23 Statutes, 8.

Post-routes and post-roads are terms used synonymously in the legislation in regard to the postal service of the United States. See Revised Statutes, sec. 3975.

The streets of this city are highways, which are defined to be public ways for the use of the public in general for passage and traffic without distinction. *Starr vs. R. R. Co.*, 4 Zab., 24 N. J. L., 592; *Bell vs. Foutch*, 21 Iowa, 119; *Barrett vs. Brooks*, Ib., 144; *St. Charles vs. Nott*, 51 Mo., 122.

Under the act of 1844, therefore, the streets of Washington are all post-roads established by Congress.

4. The Western Union Telegraph Company has the right, under and by virtue of the first section of the National Telegraph Act of July 24, 1866, to construct, maintain and operate its lines of telegraph over and along the streets of this city, the same being declared by law to be post-roads of the United States.

5. The Supreme Court has declared the nature, purpose and policy of the telegraph act of 1866, and given effect to it in a manner that should silence all doubt as to its op-

eration in respect to the subject matter of this controversy. *Pensacola Telegraph Co vs. W. U. Tel. Co.*, 96 U. S., 1; *W. U. Tel. Co. vs. Texas*, 105 U. S., 460.

6. It is clear that Congress intended to express its will in regard to the companies who should accept the act of July 24, 1866, by that act alone, and that the act of 1866, so far as those companies and their rights in the streets of the city, at least, are concerned, superseded and virtually repealed the joint resolution of March 3, 1863.

The authorities on this subject are clear and uniform. *Union Pacific R. R. Co. vs. Cheyenne*, 113 U. S., 516; *King vs. Cornell*, 106 U. S., 395; *U. S. vs. Clafin*, 97 U. S., 551; *Murdock vs. Memphis*, 20 Wall., 617; *U. S. vs. Tyner*, 11 Wall., 88; *Bartlet vs. King*, 12 Mass., 563; *Cincinnati vs. Cady*, 12 Pick., 36; *Gas Co. vs. Clarke*, 13 C. B., N. S., 837; *Mayor vs. R. R. Co.*, 20 N. J. Eq., 360.

In any view of the joint resolution of 1863, the Commissioners of the District of Columbia alone have the power to regulate the telegraph lines in this District, operated by the companies who have accepted the act of 1866; and it was within their competent authority to grant the permit of May 11, 1885, to the Western Union Telegraph Company. *Barnes vs. District*, 91 U. S., 548; *Dillon Municipal Corporations*, sec. 680, 3d ed.

The power of the Commissioners to control and regulate the streets, necessarily includes the authority to make reasonable regulations in respect to the exercise of the franchises granted by the legislature to private corporations involving the use of those highways within the District. 2 *Dillon Mun. Corp.*, sec. 720, and authorities cited; *Commonwealth vs. R. R. Co.*, 52 Penn., 516; *R. R. Co. vs. The City*, 58 Penn., 123; *Commissioners vs. Gas Co.*, 2 Jones (Penn.), 318.

The telegraph line proposed to be constructed under authority of the act of July 24, 1866, according to the requirement of that statute and with the sanction of the Commissioners, could not be regarded, when erected on the street, as an obstruction to the highway in a legal sense, or

as a nuisance, or as creating any injury to the proprietors of the adjoining premises which would be the subject of judicial cognizance.

It is a legal solecism to call that a public nuisance which is maintained by public authority. *R. R. Co. vs. Comm.*, 78 Penn., 88; *Kellinger vs. Street R. R. Co.*, 50 N. Y., 210.

The principle is that when the legislature has lawfully authorized a thing to be done, no wrong can arise except from the manner of doing the act. 29 Iowa, 148; 84 Mich., 212; 34 Mo., 259; *Miller vs. Mayor of N. Y.*, 109 U. S., 398; *Gilman vs. Philadelphia*, 3 Wall., 718.

The streets of a city are destined for public use, but not for a particular mode of public use. See this view expounded by Cooley, J., in *Macomber vs. Nichols*, 34 Mich., 212, where it was held that a steam engine, as a means of locomotion in a highway, was not necessarily a nuisance.

A city street is legally open and free for the public passage and such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare. *Barney vs. Keokuk*, 94 U. S., 340; *Att'y-Gen. vs. R. R. Co.*, 125 Mass., 516.

It has been expressly and frequently decided that ordinary telegraph poles and wires, erected within the limits of a street or highway with legislative sanction, whether directly given or mediately conferred through proper municipal action, cannot be regarded as nuisances or restrained as such. 2 Dillon Mun. Corp., sec. 698; *People vs. Met. Telephone Co.*, 81 Hun, 602; *People vs. Thompson*, 65 Howard's Practice R., 407; *Gay vs. Mutual U. Tel. Co.*, 12 Mo. App. R., 485; *Young vs. Yarmouth*, 9 Gray, 386; *Pierce vs. Drew*, 136 Mass., 75; *Commonwealth vs. Temple*, 14 Gray, 69, 77.

An individual cannot restrain the erection, under legislative and municipal authority, of large and shapely telegraph poles, in front of his premises in a city street, on the ground of special injury although they may incommode the public and subject him to some damage. *Gay vs. Mutual U. Tel. Co.*, 12 Mo. App., 491; *Forsythe vs. B. & O. Tel. Co.*, *Ib.*, 495.

Mr. Justice MERRICK delivered the opinion of the court.

This suit was instituted by five citizens of the District of Columbia, owners of property in the northern part of Seventh street, for the purpose of enjoining the Western Union Telegraph Company from erecting a line of telegraph poles along a certain portion of that street. It seems that this company, having for twenty years or more maintained lines of telegraph in the city of Washington, in the month of May last, with a view, as they allege, to diminish the number of overground communications in the city, and to aid and advance themselves towards the ultimate establishment of an entire system of underground telegraphs, applied to the proper authorities of the District for their consent and concurrence in readjusting their lines so that they might lay an experimental line of underground telegraph through certain streets of this city, and, in connection with and in fortification of that, to erect a certain partial and temporary line of poles to connect with the underground system in order to supplement it as a guard against any accidents in the working of the underground system, they alleging and averring that the underground system of telegraphy was yet an experimental one, and that while they desired to keep pace with the full progress of experimental science in that regard, yet with a due respect to the safety and permanency of their business, it would be rash and unwise and inconsiderate in them to abandon it altogether, and to rely exclusively, in the present unsettled state of the art, upon the underground system, interruptions in which, if they should happen to occur, would be of momentous consequence to the commerce of the country, to their business, and to the various interests which are dependent upon the promptness and efficiency of the discharge of the duties of that company.

In their application to the Commissioners for permission to make the change they indicated that the effect of the change would be to shorten and diminish by some ten or twelve miles the amount of aerial telegraph which they now have in the city, and to that extent that it would be a benefit to the city.



Under these circumstances they applied for the permit to make the underground connection and to make the change in the overground arrangement along Seventh street to conform to and to aid the experimental line. Permission was granted to them by the Board of Commissioners who have charge and supervision of the regulation and control of the streets of the city of Washington.

In that state of the case these five complainants, one the possessor of a feed store, one the possessor of a drug store, two the possessors of stove stores, and one the possessor of a hotel, applied to the equity branch of the court to enjoin the erection of the telegraph along the line of Seventh street, upon the ground, first, that it was a public nuisance, and incidental to the public nuisance that it was a great private nuisance and inconvenience to themselves. The injunction was granted by the court below, and an appeal has been taken to this court.

The respondents justify upon three grounds. First, that they had the lawful authority under the act of Congress of 1866 to erect telegraph poles and telegraph lines in the manner proposed; secondly, that the manner of the erection was prudential in all regards and accompanied with the least possible inconvenience to the public; and, thirdly, that there was no damage whatsoever accruing or likely to accrue from the exercise of these faculties to the parties complainant, which would justify the interposition of a court of chancery by means of injunctive relief against a nuisance.

The first and important question, therefore, arising under this state of the case is, was there any authority or right in the telegraph company to use the streets of the city of Washington at all for the purposes of telegraphy? They maintain their authority by virtue of the act of Congress of 24th of July, 1866, and, on the other hand, the complainants maintain that that act of Congress is in no sense applicable to the District of Columbia, and that whatever authority the defendants had or might have had at any time for the erection or maintenance of lines of telegraph in the city was to be derived altogether from the joint resolution of Congress

approved March 3, 1868, under which they, it seems, had professed at one time to erect certain lines of telegraph. And they maintain that even under that resolution they had no power to maintain any of their lines because they had not conformed to the requirements of that resolution, and that resolution having been a special grant to this defendant, the defendant could not, even if other companies might, act under the authority of the law of 1866—that the defendants could not act upon it, because they were limited by the special privileges of the joint resolution of 1868.

Much argument was had upon the doctrine that where there is a special law and a general law, the special law is to go along with the general law, and that whoever has claimed a privilege under the special law cannot come within the terms and provisions of the general law itself. There is no need for the court to criticise very closely or to review the authorities about the respective bearing of special and general laws upon each other in the matter of interpretation; for, after all, those artificial rules which were relied upon in the argument are mere aids of interpretation and not themselves the groundwork of interpretation. The first and cardinal rule in the interpretation of a statute is to look to the statute itself, the meaning, the scope and the object of the statute; and if, upon the face of it, you can gather plainly what was the intention of the legislature, those incidental rules which are mere aids to be invoked where the meaning is clouded, are not to be regarded.

Now, what is the act of 1866, and what was the design and purpose of it? Upon its face it calls itself "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." Here is a great scheme of progress—material progress—announced by the legislature. Its purpose, "to aid in the construction of telegraph lines"—with a view to what? To the largest purposes of Government; "to secure to the Government the use of the same for postal, military and other purposes;" thus shadowing forth those great necessities which are growing upon us day by

day in the exercise of the commercial and postal necessities of this great nation; and with a view to effectuate those ends the legislature has declared "that any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the *right*—not the *privilege*—to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which may have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States," etc.

No more plenary power could be embraced within the terms of a statute than is declared upon the face of this statute—"any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph"—with what view? In order, amongst other things, as declared upon the face of the statute, "that telegraphic communications between the several Departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be at rates to be annually fixed by the Postmaster-General;" and further, as is contemplated in the third section, that the United States shall have the privilege at any time after five years to become possessed of and own all these lines for certain ascertained prices to be determined according to the terms of the statute with a view to the great purposes of Government.

Such being the nature, purpose and scope of the statute, does it come within the principle of any sound construction to maintain that a resolution of three years preceding, which gave a special privilege to certain lines of a telegraph company to use the highways, roads, streets and grounds of the District of Columbia. I say, is it consistent with any sound rule of construction of statutes to maintain that such a statute, with such comprehensive objects, is to be dwarfed

with reference to any of these great instrumentalities of commerce by a reference to the resolution of 1863 of three years before, which granted a more restricted privilege to certain telegraph companies to use any of the highways, roads or streets of the District of Columbia under certain circumstances? Is there anything in the nature of the two acts which requires the general power, contemplating the general good of the nation, to be exercised by any company that shall establish itself so as to be a useful instrumentality of the Government of the United States, to be dwarfed by saying that it is narrowed under the privilege of this antecedent resolution, and that the small personal privilege is to stand as a qualification and restriction upon a general statute made in pursuance of a great national and general policy?

It seems to me that it does not require reference to authority; it scarcely requires a momentary appeal to right reason to see that this resolution of 1863 can be in no sense a qualification of the absorbing power granted by the act of 1866. It is perfectly true that where a special statute is in existence, and there is a general law also, passed subsequently, that the special statute may be construed, and ought to be construed, in accordance with the general law. But where the general law is all-absorbent—takes up everything and embraces what and more than was, by any possibility, contemplated by the special resolution—it seems, as I say, contrary to right reason to maintain that the general statute can, in any sense, be qualified or restricted, and that universal right can be dwarfed and narrowed by an antecedent special privilege granted to an individual or to a corporation for a special purpose.

For these reasons it seems that the resolution of 1863 can, in no sense, qualify the general power and right granted by the act of 1866.

Now, what was that power? To extend its lines over any of the post-roads of the United States. Is not the District of Columbia a part and parcel of the United States, and are not the postal roads in the District of Columbia

within the scope, object and spirit of a law providing for the most extended postal facilities to the people of these United States? Is not the general Post-Office here, the very focus from which all the postal privileges and postal communications are to emanate? Is not the Government of the United States entitled, and the citizens of the United States entitled, to the freest and fullest postal facilities into the very heart of the city of Washington? And, therefore, can it be said in any sense of the law, that the District of Columbia shall not be embraced, its postal roads shall not be embraced, in the contemplation of a general statute having such a large and beneficial purpose in view? Such an idea has no lodgment in the mind of this court. While this statute is made applicable to this District by the express provision of the law which declares that all laws of the United States not inapplicable are operative within the District of Columbia, yet it may well be put on the broader ground that on the very face of the statute itself, by the necessities of the statute and the contemplation of the law, the District of Columbia was fully embraced within the act of 1866. If so, then, notwithstanding this defendant may have exercised a privilege under the restricted powers conferred by the joint resolution of 1863, it is not debarred from the rights conferred upon every company within the borders of the United States by virtue of the act of 1866.

Having, then, this right the defendant applied to the Commissioners of the District, who have, under the general law, the power to regulate and control and supervise the use of the streets of the city of Washington, for permission to erect its lines of telegraph upon these certain streets which are indicated. It would have had the right to erect them, under this law of Congress, without the permission of the Commissioners of the District of Columbia. But, inasmuch as the Commissioners are charged with the supervision of the streets, the control and regulation of them, it was appropriate that they should see that, in the exercise of a right granted by law, there was no infringement of the correlative rights of the public, and that the right, when ex-

exercised, should be exercised in due subordination to the rights of others, and in conformity to such regulations and prescriptions as should insure the least possible injury to the rights of any individual or the rights of travel and convenience of the general public. It was, therefore, eminently appropriate that application should be made, and that this thing should be done in subordination to and with the consent and approval of the judgment of the Commissioners of the District of Columbia.

We need not, in that aspect of the case, therefore, consider whether the Commissioners would have had the power, independently of the act of Congress, to grant the right to the use of the streets for such a purpose. The right is granted, and all that is contended for on the part of the respondents in this case is, that they shall have the right subject to the reasonable control by the Commissioners of the District, whose duty it is to control the exercise of any right within the District under the general police powers which they exert for the public good in respect of such matters.

That being so, the Commissioners having given their consent, the law of Congress having granted the power, it cannot be said that there can be any public nuisance arising out of the exercise of the grant in the mode proposed on the part of the defendants. The question of a public nuisance is entirely set at rest by the grant of power on the part of Congress and the concurrence of the guardians of the welfare of the public through the instrumentality of the Commissioners of the District.

The question, however, remains: Was there, in the exercise of this right, or in the proposed exercise of this right, any private nuisance contemplated which should be restrained by the interposition of a court; because it must be conceded that while there may be a grant of authority on the part of the Federal Government to use its property, or the grant on the part of any public authority to use the public property, it must be done always with due regard to the rights of private citizens, and if the right of a private citizen be invaded it is to stand in just compensation before the tribu-

nals of justice. No man's right is to be invaded, no matter by what authority or by what power; at the same time no man has a right to set up his caprices so as to prevent the just exercise of rights for the benefit of the public, whether by the public itself or by any private agency which the public chooses to adopt as the instrument for carrying out the purposes of the public welfare.

Before we consider the gravamen of the private grievances alleged on the part of the complainants here, it is well enough to see what the general rules of law are which regulate applications for redress of this sort on the part of any citizen who applies for injunctive relief to a court of chancery. We need not go outside of two leading decisions pronounced by the Supreme Court of the United States as to the measure of chancery power in this respect. There has been a great deal said and a great deal written with regard to the extent of injunctive relief, and a great deal of conflict and confusion in decisions in various places. But, happily, as we have the most august tribunal in the world to lay down the rule of action for us, wherever they have spoken it is enough for us to recognize and be governed by what they have said, leaving nice distinctions and complicated rules elsewhere to adjust themselves as they best may under the administration of law not governed and controlled as we are by this one tribunal to which we can resort with so much confidence.

In the second of Black's Reports, in the case of the Mississippi & Missouri Railroad Company *vs.* Ward, the rule was laid down by the Supreme Court. That was an application to restrain the erection of a bridge, at Rock Island, over the Mississippi river. The court used this language, at page 494:

"In the next place: Is the bridge west of the Illinois boundary an unreasonable obstruction, and therefore a nuisance that a court of chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the bridge company for committing the nuisance; and the rule is that if the abridgment of the right

of passage occasioned by the erection was for a public purpose, to produce a public benefit, and if the erection was in a reasonable situation, and a reasonable place was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable.

"Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a court of chancery where the court ascertains the fact of nuisance."

That is in regard to a public nuisance where a private party seeks to restrain the injury to himself through an operation of a public nuisance.

In the same volume they also lay down the rule with reference to purely private nuisances, which have not any public aspect at all, and that is done in the case of *Parker vs. Winnipiseogee Lake Cotton and Woolen Company*. In a series of resolutions collated by the court, to be found at page 552, they say:

"A diminution of the value of the premises without irreparable injury is no ground for interference.

"Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion.

"This jurisdiction is applied only where the right is clearly established; where no adequate compensation can be made in damages, and where the delay itself would be a wrong.

"The case must be one of strong and imperious necessity, or the right must have been previously established at law.

"The right must be clear and its violation palpable.



"If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld.

"After the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case."

Now, these are the rules with regard to injunctions that bind the administration of injunctive relief in this court. Apply them to the allegations and the facts in this cause. What are they? I have already shown that the case of the plaintiff acquired no additional force by reason of the allegation of a public nuisance, because the act having been by authority of law, the question of public nuisance is out of the case. Then, how do they stand with regard to the claim for a private nuisance? What are the pretenses which they set up?

In the first place, as I have said, one of the complainants owns a feed store, one owns a drug store, one owns a hotel, and two own stove stores, in a crowded thoroughfare, Seventh street north. Now, what are their allegations? They are to be found in the fourteenth paragraph of the amended bill. It is to be observed that they do not claim on account of their residence; they do not claim on account of private families; there is no allegation of that sort in the amended bill. They have stricken out the second paragraph of the original bill, and in the second paragraph of their amended bill, they simply aver themselves to be the owners and occupants of certain establishments and buildings in the city of Washington, describing them as applied to the uses which I have just designated. Then in this fourteenth paragraph, they lay down the gravamen of the injury of which they complain: "That the said poles, if erected, will seriously and materially interfere with the use of the said portion of the said street and the ordinary travel thereon, and will obstruct and impede the ordinary use and enjoyment by the complainants of their said several premises, and the said portion of the said street, both as a highway and for other purposes for which the same, as contiguous to their said

several respective premises, is now properly and lawfully used by the complainants."

Is there anything in that allegation? The poles, as it appears, are to be placed, according to the proof and the sworn answer, at the distance of 150 feet apart along the line of the curbstone and as near as may be upon the dividing line of lots and never in front of the entrance of any house or store along the line of the street. That is the sworn answer, that is the proof and that is the fact.

Now, with that fact staring us in the face, is it not too great an appeal to the credulity of any judicial tribunal to say that the erection of poles at intervals of 150 feet along the line of a street can make any substantial impediment to the entrance of any business place on such street? We have those things, as is matter of public notoriety, all over the city of Washington, all over the crowded cities of New York, Philadelphia, Boston, Baltimore, and the western cities. And we have not been shown any case in which it has ever been held that these telegraph companies have been restrained from the exercise of their business or the erection of their poles upon the ground that they impeded, in point of fact, the access to any business place within any of these cities. And it cannot, in the nature of things, be that they do. A space of twelve inches which is about the average width of the pole, or fifteen inches, if you please, occupied at intervals of 150 feet, can be no practical impediment to the approach of any man's house along any street of the city.

The next allegation, which is part and parcel of the same, is that it will impede and interfere with the complainants, their families and their customers in business in access and approach to, and departure from the said tenements and premises. How can the entrance to a doorway be largely impeded by a pole twelve inches wide one hundred feet off? And they do not offer any proof, in point of fact, of any such impediment.

Then they say that the "wires proposed to be strung upon the said poles, will, if so strung, be liable to be blown down and fall upon the said portion of the said street, to the

great peril of the complainants, and during the high winds, which prevail in the said city, will create a great and loud hissing and singing noise, to the disturbance of the sleep and quiet of the complainants residing in their vicinity."

That is a prospective and imaginary difficulty, and it may be dealt with sufficiently by quoting the language of the Court of Appeals of the State of Missouri in the case of *Gay vs. Mutual Union Tel. Co.*, 12 Mo. Ap., 491:

"The fears expressed by plaintiff's witnesses that the vibrations of the pole may cause the area wall (which prevented the water in a sewer from getting into plaintiff's cellar), to crack, thus letting water from the sewer into plaintiff's cellar; and that, by reason of its great height, it may be blown down in some unprecedented storm, are mere conjectures, of problematical and contingent damage, which is not likely to arise, but which, should it arise, under such circumstances as would impute it to the negligence of defendant, would afford ground for redress in an action at law for damages."

The utterance of that enlightened court is quite a sufficient answer to problematic danger which these complainants allege here with a view to arrest a great work.

The complaint also alleges: "That the said wires will, if erected, seriously and materially increase the danger of destruction of the said tenements and buildings by fire, by their liability to attract lightning, and by their bringing into proximity to the said tenements and buildings the action of electricity; and that they will also seriously hinder, impede and obstruct the operations of the Fire Department of the said city in extinguishing any fire or fires that may occur in and upon the said tenements and buildings, and will interfere with access to and escape from the same in case of necessity on account of such fire or fires."

This completes the enumeration of the grievances that these parties complain of. The answer to it, besides being obvious to the common sense of every man, will be found, if there be need to refer to authority, in the case of *Rhodes vs. Dunbar*, 57 Penn. St. Rep., 274, and in the case of

The Mayor of Baltimore *vs.* Radecke, 49 Md., 228. In this last case there was an application to restrain the erection and maintenance of a carpenter's shop which was run by a steam boiler in a crowded part of the city, where, as the parties alleged, there was a most imminent danger by reason of the combustible materials used there of setting fire to the adjacent property and by enhancing the insurable risks of property on account of this great danger; and that was the point of injunctive relief made by the parties. The Court of Appeals said that the complaint that the business conducted was dangerous, and conducted with combustible materials brought into dangerous proximity to the fire of the boiler of the engine, subjecting their buildings to much hazard and their merchandise to increased danger from fire, raising the prices of insurance and exciting the fears of neighboring owners for the safety and security of their property, were imaginary dangers, and not at all—any one or all of them put together—the occasion for injunctive relief against a legitimate business prosecuted in a legitimate way.

This disposes of each and all of the objections urged in the fourteenth paragraph, so far as they affected the rights of these parties as the foundation for their claim to a court of chancery for injunctive relief. But, assuming that there was some injury, still that injury would not of necessity, would not of itself, justify the application to a court of chancery for relief. As I have said, and as the authorities lay down the rule, the court of chancery will consider all the circumstances and equities of the case; and where, as a consequence of its interference, the hardship upon one side would be immeasurably greater than the injuries sustained by the other it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law. It seems to this court that it would be an extraordinary stretch of power to strike down a great commercial agency, to destroy one of the chief instrumentalities of intercommunication in this country, because, peradventure, lightning might be passing along a wire and

strike the house of a party who lived near the line of the telegraph, or that it increased the amount of his insurance, or that it made some noise occasionally which excited the nerves of a restless sleeper so that he was made unduly watchful during the hours of the night.

These general views seem to dispose of all the important questions of law in the case, as also they dispose of the special equity set up by the complainants in the cause. In view of everything connected with the case this court is of opinion that there is no foundation whatsoever for the application which has been made for injunctive relief, and that the bill of the complainants ought to be dismissed with costs.

## THE UNITED STATES vs. CHARLES HAMILTON.

CRIMINAL DOCKET. No. 14,417.

{ Decided March 22, 1886.

{ The CHIEF JUSTICE and Justices COX and MERRICK sitting.

1. It is error to charge the jury that the accused must have been in imminent peril of his life or of some great bodily harm, in order to support the defence of justifiable homicide, nor will the error be cured by the fact that the court, at the close of the charge, in a colloquy with counsel, assents to a suggested modification of its instruction on this point, when it does not appear that the jury's attention was directly called to the matter.
2. Where a charge of great length is so delivered as to render it susceptible of different intendments in the minds of a jury, some of which may prove fatal to the accused, a new trial will be granted, although, taking the whole charge together, the law was stated correctly.
3. It is error to charge the jury that, if they have any reasonable doubt about the guilt of the defendant or *any* doubt about his guilt, they may take into consideration evidence of his good character, as that is calculated to leave the jury with the impression that only in doubtful cases can evidence of good character be considered. Evidence of good character is the eye glass through which the jury are to look at the whole case; it does not authorize them to overrule the truth or to disregard the force of other evidence, but it is to be considered and weighed with all the testimony in the case.

THE CASE is stated in the opinion.

A. S. WORTHINGTON for the United States.

THOMAS F. MILLER for defendant.

Mr. Chief Justice CARTER delivered the opinion of the court.

In the case of the United States against Charles Hamilton, the defendant was indicted for murder in a single count, but convicted of manslaughter under the doctrine that every charge of murder implies the offence of manslaughter.

The case is presented to us on the assignment of two principal errors; first, that the court erred in charging as to the law of self-defence; second, that the court erred in charging the law governing evidence of good character. The charge was delivered extemporaneously, and at considerable length.

The court told the jury that the defendant must have been in imminent and absolute peril of his life or of some

great bodily harm to justify the expression of violence on his part imperiling the life of his antagonist; and if the case had involved (as, judging from the charge, the court seemed to think it did), the simple question, whether demonstrative violence on the one side with a bludgeon, or with an implement perilous to life, would justify the return of violence as a means of self-protection, the charge of the court upon that subject would have been a proper exposition of the law.

Afterwards, however, upon being requested to charge that that was not the real issue, that a justification for killing in self-defence reached further back than that, and undertook to inquire into the undeveloped purposes of the aggressor—to weigh his intentions and his capacity to carry those intentions into effect, and to say from that investigation whether the defendant had reasonable cause to apprehend danger to his life or other grave and imminent peril to his body, and not as the court had instructed that the jury must find from the testimony that the defendant was in imminent peril of his life or some great bodily harm, the court qualified its instruction. But what embarrasses us is the manner in which this qualification was made.

No doubt a lawyer could dissect from this charge a purpose in the court to declare that it was not necessary that a man should, as a matter of fact, have been in imminent peril of his life; that the aggressor should exhibit a pistol to justify the defendant in the use of his as a defence, or that only where the bludgeon was raised was he justified in striking him down, for a lawyer would have followed the court along in its charge, and worked out of it the result, which those qualifications were intended to effect.

But are laymen expected to perform the work of a lawyer? Instead of receiving a single, simple and unembarrassed affirmation of the law, are they to be left to construe the meaning of a charge susceptible, in their minds of different intendments, some of which may prove fatal to the accused.

Most of the qualifications of this charge were colloquial in character; that is to say, after the charge was delivered

in the colloquy which usually arises between the court and counsel, the proposition was advanced by counsel, and assented to by the court, that reasonable occasion for apprehension of danger to life or limb was all that the law demanded. Now, it may be possible that the jury thought this conversation intended for them. And it is just as possible that they thought the counsel and the court were attending to a matter which did not concern the jury. If the court had turned around to the jury in response to these suggestions of counsel, and told them that the law of the subject was that a man should be reasonably convinced that he is in imminent peril of life or of bodily harm, it would have translated the whole of that intercourse to the jury, and would have disembarrassed this charge of its objectionable features in this respect. But it is very difficult to say here whether the jury regarded this colloquy of the court both with the public prosecutor and with the counsel for the defence, as a discussion with counsel of the principles of the law in the case, or as a direct instruction to the jury.

Upon the whole, therefore, we are not able to say that the minds of the jury may not have been led astray and that they did not adopt the original declaration of the court as the law of the case. These views have resulted in our conclusion that the case in this respect was a mistrial and that the judgment should be reversed.

We think also that the office of good character as an element in the case was misconceived by the court or for the moment lost sight of. It is the privilege of every man on trial to throw the weight of his good character into the jury box. He has a right to it, it is his property, he has earned it, and the law recognizes it as a factor in the administration of justice.

The instruction of the court upon this point must have left the jury with the impression that it is only in doubtful cases that evidence of good character may be considered. They were told that if they had reasonable doubt about the guilt of the defendant, or if they had any doubt about the guilt of the defendant (for it was put both ways) they



would then take into consideration the factor of good character.

But the defendant is entitled to that evidence in any event.

If there is a reasonable doubt, a man of bad character is entitled to an acquittal. Because he is a rascal is no reason why he should be punished for a crime which he is not proven beyond a reasonable doubt to have committed.

But the rascal is not entitled to the benefit of good character in the consideration of the question of his guilt. On the other hand the man who has earned a good character is entitled to the benefit of it when he is accused of a crime inconsistent with that character. His good character does not authorize the jury to overrule the truth or to disregard the force of other evidence. But it is an eye-glass through which they may look at all of it. If their consideration of it is to be limited only to doubtful cases—where they would be bound to acquit anyway—evidence of good character would be useless to a man at the very time when he needs it most, for he does not need it in a doubtful case.

There are cases when without evidence of good character a jury would have no reasonable doubt of a man's guilt, but with such evidence in the case a reasonable doubt might arise sufficient to secure a verdict of acquittal, this shows that evidence of good character is an element which is to be considered and weighed with all the testimony in the case.

The judgment is reversed and a new trial granted.

JOHN J. SCHILLINGER ET AL. -

vs.

HENRY L. CRANFORD ET AL.

{ Decided July 6, 1885.

{ Justices HAGNER, JAMES and MERRICK sitting.

1. The invention set forth in re-issued letters-patent granted to John J. Schillinger May 2, 1871, for an improved concrete pavement considered and the claim held to be confined to "the arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose described."
2. In this patent the "equivalent" of the tar paper must be held to mean some flexible or manageable substance, but the use of sand and cement for filling the interstices between the separate blocks is not such equivalent.
3. The method adopted by the defendants in laying artificial stone pavements was as follows; He prepares, first, the bed of the pavement, and then places parallel strips of plank diagonally across it. He then fills the first space or subdivision with a mass of concrete and broken stone or similar substance, and repeats this process with the third and other alternate subdivisions. Then a large iron instrument called a cleaver is driven through or nearly through the concrete mass so as to mark off these subdivisions into blocks. After that is done, a different substance, *not concrete*, but composed of cement and sand, moistened and reduced to plastic form, is spread over the concrete and rubbed into the gaps formed by the cleaver. Then the whole is smoothed over and the top surface is cut through with a trowel exactly in a line with the cuts below. That is again smoothed over and what is called a "jointer" is run in the same lines which gives the pavement the appearance of separate blocks. The process is then repeated with the second, fourth and other alternate subdivisions until the whole pavement is completed. *Held*, not an infringement of Schillinger's Patent.
4. A charge of fraud in obtaining the reissue of a patent cannot be considered in a suit for an infringement of the reissued patent; but it is competent for the court to examine whether the reissue comprehends a new invention, and if it shall find such to be the case, to pronounce such new grant void.
5. Where a patentee applies for a reissue under section 4916 of the Revised Statutes, and files a corrected specification containing new matter, but afterwards files a "disclaimer," as provided for by the next section, such disclaimer, if broad enough to withdraw every portion of the new claim, leaves in the reissue nothing but what was contended for in the first issue.
6. If the disclaimer, however, is not in fact as comprehensive as it was intended to be, so that any part of the new invention inheres in the reissue, then such part of the new matter is valueless and void, and must be discarded with the new invention.

7. Only so far as the new invention can be fairly considered as introduced to explain and illustrate the first invention, apart from the new claim, should it be looked to in examining the extent and scope of the old claim: but the matter so considered must be only such explanations or illustrations as the patentee would have set forth originally in his application for the first patent, had he not omitted to do so "by inadvertence, accident or mistake, and without any fraudulent or deceptive intention."
8. The omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible.
9. So, where a patentee states in his specification that a particular part of his invention is to be constructed of a particular material, and states or implies that he does not contemplate any other material as being suitable for the purpose, it *seems* that the courts will not treat any other material as the equivalent of the one recommended by the patent.

Appeal from a decree of the Special Term.

THE CASE is stated in the opinion.

EPPA HUNTON for complainants:

When the first claim and specification relating to it was disclaimed, it left the reissued patent good for the second claim and its relative specifications. The patentee then had a valid patent for all that was in the reissue that had not been disclaimed. The residue not disclaimed was not affected by the disclaimer. In *Gage vs. Herring*, 107 U. S., 646, Mr. Justice Gray, delivering the opinion of the court, says:

"The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim which is repeated and separately stated in the reissue patent. Under the provisions of the patent act, whenever, through inadvertence, accident and mistake, and without any wilful default or intent to defraud or mislead the public, a patentee in his specifications has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is justly and truly his own, provided the same is a material and substantial part of the thing patented and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the Patent Office a

disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold." Rev. Stats., §§ 4917, 4922; *O'Reilly vs. Morse*, 15 How., 62, 120, 121; *Vance vs. Campbell*, 1 Black, 427.

The action of the Commissioner of Patents in granting a reissue is conclusive on all questions except fraud. *Curtis*, § 282, p. 351.

In a suit for infringement the court cannot go behind the decision of the Commissioner and inquire into the frauds by which the reissue was alleged to have been procured. *Rubber Co. vs. Goodyear*, 9 Wall., 788; *Foley vs. Harrison*, 15 How., 448; *Eureka Co. vs. Bailey Co.*, 11 Wall., 488; *Seymour vs. Osborne*, 11 Wall., 516.

Are the pavements laid by Cranford for the District of Columbia and for the Federal Government around the Government reservation south of the Executive Mansion infringements of the Schillinger patent?

This patent was before Judge Blatchford, of the southern district of New York, in the case of *Schillinger vs. Gunther*, reported in 14 Blatch., 152.

In that case the learned judge, who has been considered a leading authority on patents, held that the patent was construed after the disclaimer to be "for a concrete pavement formed in blocks or sections and with tar-paper or its equivalent interposed in the joints during the process of laying the pavement to make the sections separable." "It consists in the artificial division, consequent upon interposing tar-paper or temporarily a trowel or cutting instrument to fit the joint." This was a decision on the report of master to ascertain the profits. The same case was before Judge Blatchford again and also before Judge Shepman, reported in 17 Blatch., 66. In every case the patent was sustained and construed.

In 1881 this patent was before Judge Sawyer, United States circuit judge for California, in the case of *The California Artificial Stone Paving Company vs. Perine*, and *Same vs. Molitor*, reported in 8 Federal Reporter, 821.

In this case the learned judge decided that "the patentee is entitled to all the benefits which result from his invention whether he has specified all the benefits in his patent or not." "That the respondents having so constructed their pavements as to gain the advantages secured by the Schillinger patent, and by substantially the same means, they are infringers of the patent."

How were the pavements in these two cases laid?

From the opinion and decisions of the judge we learn that these pavements were laid as follows:

"They first laid down a section as wide as the blocks were wanted and tamped it down solid; when partially set these sections were cut into blocks of proper length with a *trowel*, the trowel cutting to a greater or less depth according to the character of the material. Into the open joint thus made with the trowel was floated or rubbed some of the same material of which the block was composed. Then a top layer of finer material containing a larger portion of cement was laid on the lower section, pressed down and smoothed over; the trowel was then passed along the top layer, cutting partially or wholly through it, directly over the cutting below; the joint thus made in the upper layer was then smoothed over, and a joint marker, having a tongue from a sixteenth to an eighth of an inch in depth, was run over the line of the cuttings, marking off the joints."

The judge says in the course of his able opinion:

"Now the Schillinger patent is evidently a valuable patent—Schillinger was the first man who ever made pavements of this character. Immediately after its discovery it went rapidly into very general use; and other parties began to infringe. The first infringers, as Judge Blatchford states, cut joints and filled them with pitch or asphaltum." "By Judge Blatchford it was held that the pitch or asphaltum which was filled into the cuts along the joints effected the same purpose as and was the equivalent of the tar-paper."

"Infringers then tried various ingenious methods of evading the patent. The next course adopted was the filling of the cuts or joints by pouring in cement, which is

one of the component parts of the material of which the pavement is formed, in the same way that the pitch or asphaltum was used. This was held to be an equivalent of tar-paper and an infringement.

"Then it was held that it was not necessary that there should be any material *permanently* interposed in the cuts or joints, but that if the joints were made during the process of formation, by inserting the trowel or other instrument cutting a joint substantially as was done in this case, then the complainant's patent was infringed." Schillinger *vs.* Hurlbut.

In this case Judge Blodgett, of the northern district of Illinois, approves and sustains the prior decisions.

This patent, its validity and the infringement of it have also been before Judge Sage of the United States Circuit Court of Ohio. It was decided in 1884. Kuhl *vs.* Mueller *et al.*, 21 Fed. Rep., 510.

The judge sustains the patent and declares the pavement laid an infringement.

This patent was again before Judge Blatchford in the case of Schillinger *vs.* Greenway Brewing Company, reported in 21 Blatchford, 383.

The judge in this case reviewed all the cases, and in an elaborate opinion sustained the patent and decided that the pavement laid by defendant was an infringement.

It has also been before the Supreme Court of the District of Columbia in the case of Schillinger *vs.* Metropolis Paving Co., No. 2464, Equity Docket 11. In this case also the complainant was successful in maintaining the validity of the Schillinger patent, and obtained a perpetual injunction against its use.

It will be observed by a comparison of these decided cases that not one of them is so clear an infringement as the pavements laid by Cranford and involved in the case now before the court.

In this case a sharp cleaver four feet long and five or six inches wide was mauled into the first course, and was designed to divide most effectually into blocks or squares this

course. The division was unquestionably effected in most if not all instances. The division of second course was as effectually made by the trowel and joint marker. Now compare the construction of these pavements with any passed upon and adjudged to be infringements in the cases cited, and it will be found that these pavements are more clearly infringements of the Schillinger patent than any other. Indeed, it is difficult to see how the infringement could be made clearer without the use of tar-paper itself.

COOK & COLE and ENOCH TOTTEN for defendants :

The improvement, if indeed it be one, is not an invention or a discovery within the meaning of the patent laws of the United States, so as to authorize the granting of a patent therefor. *Beecher M'f'g Co. vs. Atwater M'f'g Co.*, 114 U. S., 523; *Thompson et al. vs. Boisselier et al.*, 114 U. S., 1; *Stevenson vs. Brooklyn R. R. Co.*, 114 U. S., 149; *Hollister vs. M'f'g Co.*, 113 U. S., 59; *Morris vs. McMillin*, 112 U. S., 244; *Phillips vs. Detroit*, 111 U. S., 604; *Manufacturing Co. vs. West et al.*, 111 U. S., 490; *R. R. Co. vs. Locomotive Co.*, 110 U. S., 490; *Bussey vs. M'f'g Co.*, 110 U. S., 131; *Double-Pointed Tack Co. vs. M'f'g Co.*, 109 U. S., 117; *King vs. Gallun*, 109 U. S., 99; *Slawson vs. The R. R. Co.*, 107 U. S., 649; *Atlantic Works vs. Brady*, 107 U. S., 192; *Hall vs. MacNeale*, 107 U. S., 90; *Vinton vs. Hamilton*, 104 U. S., 485; *Terhune vs. Phillips*, 99 U. S., 592; *Dunbar vs. Myers*, 94 U. S. 187.

The reissue is void because for a different invention from that specified in the original patent. *Rev. Stats. U. S.*, § 4916; *Mahn vs. Harwood*, 112 U. S., 359, and authorities there cited.

But if this were not so it is void as to everything not embraced in the original. *Ibid.*

The reissue, as modified by the disclaimer, covers the same as and no more than the original, and is for that reason void. *McMurray vs. Mallory*, 111 U. S., 97.

The reissued patent is void because no disclaimer has been filed as to the District of Columbia. *Rev. Stats. U.*

S., §§ 4917, 4922; *Wythe vs. Stone*, 1 Story, C. C. R., 273; *Reed vs. Cutter*, 1 Story, C. C. R., 590; *Walker on Patents*, §§ 203, 204, 206, and authorities there cited.

Both Justices Blatchford and Sage, in construing this patent, have said that after the disclaimer nothing remained but this second claim of the reissue, which was identically the same as the single claim in the original. *Schillinger vs. Gunther*, 15 Blatch., 305; *Kuhl vs. Mueller*, Official Gazette Patent Office, Aug. 5, 1884, p. 541.

And clearly, without the aid of the disclaimer, the reissue can be valid, if at all, for only what was embraced in the original. *Coon vs. Wilson*, 113 U. S., 268, cases there cited.

If a patentee, after he has obtained his patent, acquiesces without objection for a series of years in the known public use by others of his invention, such conduct will amount to an actual abandonment or surrender of his rights under his patent. *Wythe vs. Stone*, 1 Story, C. C. R., 282.

Mr. Justice HAGNER delivered the opinion of the court.

This is a bill filed by Mr. Schillinger, in his own name as patentee, and by various co-plaintiffs, as assignees within the District of Columbia, of portions, amounting now in all to six-sevenths, of a patent.

The bill alleges that the defendant Cranford had infringed these patent rights, and calls for an injunction and an accounting.

There is a large mass of testimony in the case which we have carefully examined. It discloses differences in statements of the witnesses of the opposing parties, both as to the details of the process of laying the pavement used by Cranford, and also as to his purpose in following those details. But the weight of the evidence shows that the mode in which Cranford lays his pavement is substantially as follows: He prepares first what may be called the bed of the pavement, and then places parallel strips of plank diagonally from the curb across this bed of the pavement towards the houses fronting on the street. He then begins with the first subdivision formed by these boards and fills the space



between them with a mass of concrete, composed of Portland cement, sand, and some broken stone or other similar substance. Having done that he goes to the third subdivision in order, and the same process is repeated there. He then takes a large iron instrument called a cleaver, and drives it down a considerable distance, entirely through or nearly through the concrete mass so as to mark off these subdivisions into blocks. After that is done, he takes a different substance, *not concrete*, but composed of cement and sand, moistened and reduced to plastic form, and uses it as an additional or top coating over the concrete. This is spread on the subdivisions across which the cleaver has left these gaps, and then the whole surface is "rubbed down." Necessarily portions of this last substance intrude themselves into the gaps. After that has been made perfectly smooth the workman takes a trowel and cuts through the top surface exactly in a line with the cuts below. Again that is smoothed over, and then what is called a "jointer" is run in the same lines; and when this has been completed the pavement has the checkered or tassellated appearance of separate blocks. He repeats this process with the second and fourth subdivisions, and finishes the remaining subdivisions alternately.

Then as to the motives with which he follows these details which I have described. The plaintiffs say that his purpose is to form separate blocks, so that each can be taken up without injury to the adjacent blocks, and also to prevent the cracks which may occur in one block from running across continuously into the other blocks. And they say, as proof of their assertions, that the blocks which Cranford thus forms can be taken up separately, and have been so taken up; and, also, that the proof shows that the cracks are controlled by the lines. Cranford admits that the effect of his method is to make the joints weak; but he denies that his purpose in making the cuts is to allow the taking up of blocks separately; and he further denies that in point of fact that they can be taken up separately; and he produces exhibits to show, and some of his witnesses testify, that ef-

forts repeatedly made to take up any one of the blocks without injuring the others proved abortive; and, again, that so far from the cracks having been controlled by the lines in the pavements laid by him, they run indiscriminately, at their own will, across the lines.

This is about the state of the proof on this point; the principal conflict in the evidence being as to the motives of Cranford in following these details in the fabrication.

It has been much insisted on behalf of the complainants that this question has been so frequently answered in a manner favorable to their pretensions by several of the circuit and district courts of the United States, that it should be considered *res judicata*, and our only course should be, upon the facts before us, to acquiesce in those decisions and decide this case in their favor.

On the other side, we have been referred to decisions of similar courts, which it is insisted by the defendant are inconsistent with those referred to by the complainants. This court, like other courts of the country, is charged with the examination for itself of the questions involved in complaints of infringement; and the circumstance that to this court, located at the seat of government, is entrusted the exceptional jurisdiction of determining appeals from the decrees of the Commissioner of Patents, may well be considered as imposing upon it a special duty of making such examinations with care, and of deciding only upon its own conviction of the merits of the case.

This course we have pursued in similar cases, as in that of the Dental Vulcanite Company *vs.* Brightwell, Mac A. & Mackey, 74, where we were much pressed with the weight of a number of decisions in other circuit courts which had declared the use of celluloid to be an infringement of a previous patent; and especially to the ruling to that effect in the District of Maryland nearest to the seat of our jurisdiction. But we felt constrained to decide otherwise upon a careful examination of the case, and that ruling was afterwards decided by the Supreme Court of the United States, in a similar case, to be correct.

Entertaining the highest respect for the learning and ability of the learned judges whose opinions were referred to, we must yet do what they themselves felt obliged to do; and we proceed to examine this matter for ourselves.

Approaching the question therefore, as a new one, we are to enquire what was the object and scope of the invention secured to Schillinger by the patents relied on, as disclosed by his applications and the patents themselves. Schillinger's original patent was issued the 19th of July, 1870. On the 21st of the following May he claimed the benefit of the provisions of section 4916 of the Revised Statutes, which (omitting words unimportant here) declares that:

"Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had the right to claim as new; if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification to be issued to the patentee.

"Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law on the trial, &c., as if the same had been originally filed in such corrected form, but *no new matter* shall be introduced into this specification, &c."

Notwithstanding the positive provisions of this statute, Schillinger admits that "new matter" was introduced into the amended specifications, and that the new patent was not for the same invention alone.

To avoid the consequence of this illegal enlargement of the patent, in February, 1875, he availed himself of another privilege given by section 4917 of the Revised Statutes, which declares (omitting words unimportant in this connection) that "whenever, through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which

he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, &c., may, on payment of the fee, &c., make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent, &c. Such disclaimer shall be in writing, attested, &c., and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant, &c."

There can be no doubt that the reissued patent, after the filing of the disclaimer, ceased to have any operation beyond the grant in the original patent; and that no omissions in the new specifications of expressions found in the original, and no addition in the new specifications of expressions not contained in the original, can have the effect to enlarge or to diminish the first grant. As all the decisions about this patent agree, Schillinger's rights under the new patent, after the disclaimer, were the same as those under the first patent—no more and no less. But as it is construed by the complainant, he obtained as much by the first application as he would have done if it had been in the exact language of the second, and had explicitly included the new claim which was introduced for the first time in the second application.

It is therefore proper to examine the original specifications and patent with care. By section 4888 of the Revised Statutes of the United States it is provided (omitting words here unimportant):

"Before any inventor shall receive a patent for his invention he shall file, with his written application to the Commissioner of Patents, a written description of the same, and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound and use the same; and in case of a machine he shall explain the principle

thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."

In compliance with this requirement, in the commencement of the original specifications, Schillinger declares that they "contain such full, clear and exact description of his invention as will enable those skilled in the art to make and use the same."

He then proceeds to state in general terms, first, what his invention has relation to; second, what it consists of; third, the substance or material involved in its production; and fourth, the result designed as follows: "The invention *relates* to pavements for sidewalks and other purposes." "It *consists*, in combining with the joints of concrete pavement, strips of tar-paper, or other equivalent material, arranged between the several blocks in such manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting or injuring the blocks adjacent thereto."

The *substance or materials required* are said to be, first, tar-paper in strips or its equivalent; and second, blocks of concrete placed in juxtaposition. The combination of these articles is to be effected in the joints of the several blocks, and *the result* is the production of "a suitable tight joint."

After this general statement he describes the particular method he adopts in carrying out his invention. The concrete is to be formed "by mixing cement with sand and gravel, or other suitable materials, to form a suitable plastic composition," not confining himself to particular proportions in making the concrete composition. He proceeds:

"While the mass is plastic, I lay or spread the same upon the foundation or bed of the pavement, either in molds or between movable joists of the proper thickness so as to form the edges of the concrete blocks *a, a, &c.* When the block *a* has been formed, I take strips of tar-paper, *b*, of a width equal, or almost equal, to the height of the block,

and place them up against the edges of the block in such manner that they form the joints between such block and the adjacent blocks. After completing one block, *a*, I place the tar-paper, *b*, along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint and proceed with the formation of the new block until it is completed. In this manner I proceed in making all the blocks until the pavement is completed, interposing tar-paper between their several joints as described."

He then states in detail the result:

"The paper constitutes a tight, water-proof joint; but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. The paper does not adhere when placed against the edge of the fully formed block, and therefore the joints are always free between the several blocks, although adherence may take place between the paper and the plastic edges of the blocks which are formed after the paper joints are set up in place."

And he concludes with this statement of the extent of his invention:

"What I claim as new, and desire to secure by letters patent, is:

"The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose described."

It seems plain to us that the only claim of Schillinger, as thus set forth in his specification, was to a *combination*, which would furnish a complete and efficient method of *separating adjoining blocks of concrete*, by the simple expedient of *interposing strips of tar paper, or of some equivalent material, between the joints of the adjacent blocks*; and that no further invention had suggested itself to him up to that time.

To the extent of his claim, thus defined by himself, the United States granted him an exclusive right of manufacture, which none could exercise without the purchase of the

privilege, and which could not be infringed without reparation. If he had then made good his claim to more he might equally have received an enlarged privilege. But he obtained at that time all he claimed. One seeking a monopoly, which for seventeen years is to levy a tax upon the whole country, for the use of a device which may occur to many others many times during the life of the monopoly, but who are forbidden to use their invention because a patentee has outstripped them, may surely be required to use plain terms that plain people may be able to understand, explaining what it is he claims to have invented. The purchaser of a right under the patent is entitled to find in the specification a full, clear, concise and exact description of the invention, to enable him to make, construct, compound and use the same; and the patentee declared that he had furnished such description. It is also held by the authorities that the further object of the specification is that after the expiration of the term the public shall have the benefit of the invention. 2 Greenl. on Ev., sec. 490.

It is insisted, however by the complainants, that within the terms of the re-issued patent are contained claims greatly more comprehensive than the one we have found allowed in the original.

First. It is said that any substance which may be interposed between the adjacent blocks is the equivalent of the tar paper; and particularly that the interposition of a portion of the concrete of which the blocks are made, or of a mixture of cement and sand used as the surface coat and formed of a composition different from that suggested by Schillinger, would constitute an infringement.

Second. That the interposing substance need not be left permanently between the blocks, but that the temporary insertion of an instrument, as an iron trowel, between the separate blocks would be an infringement.

Third. That the patent would be infringed simply by the running of a marker to the depth of part of an inch through to a coat of cement and sand and laid on top of a layer of concrete, provided the effect of the mark would be

to control the cracks and prevent them from running from one block into another, or would enable the separate blocks to be taken up without any or with less injury to the adjacent blocks.

And, finally, that the patent comprehended the formation of sections or separate blocks of concrete on the ground, which could be taken up without injuring the adjoining blocks.

Are these claims, or is either of them, justly within the scope of the original specifications and patent?

First; the language of the patentee in describing the mode of making and using the invention seems to exclude the idea that concrete composed of sand, cement and gravel, or other suitable material, could have been in his mind as a possible equivalent of the tar paper.

Examining this description we find that whatever may be the equivalent of the tar paper is to be "arranged" or "interposed" between the blocks; implying a fixing with design, and not the chance falling of the substance into the crevices. The substance must be in "strips" or in some equivalent form, according to the fair construction of the language, and must, therefore, be of a composition capable of assuming such form; for the workman has "to take strips" of a proportionate width about equal to the height of the block, and "to place them [the strips] up against the edges of the block in such a manner that they [the strips] form the joints," &c., and the tar paper, or its equivalent, then "constitutes a tight, waterproof joint," which "does not adhere when placed against the edge of the fully formed block," but may adhere "to the plastic edges of the blocks, which are formed after tar paper joints [or joints of the equivalent substance] are set up in place."

Not one of these methods is practicable, if concrete or cement and sand, are substituted for the tar paper. These materials cannot be made into strips or equivalent forms, or be arranged in the mode specified. The concrete necessarily containing gravel or similar hard substances, could not well be pushed into the narrow crevice only wide enough to be



filled by the thin paper; nor could either substance make a tight waterproof joint.

According to the explicit declaration of the patentee, immediately upon the formation of the first block and before it can harden, he puts the plastic composition for the next block up against the tar-paper joint. This does not contemplate the existence of any gap or crevice requiring anything to fill it up, as the new block is built directly against the old one; without any such delay as occurs in the Cranford method which builds the blocks in alternate subdivisions, the blocks in the first and third subdivisions being formed before those in the second or intervening subdivision are begun.

The drawings accompanying the specifications and which by law form part of it, would suggest to no one inspecting them the idea of separating the blocks as they are made, either by concrete or by cement and sand, or by the blade of a trowel only temporarily interposed. The interposed substance is there delineated as forming a permanent part of the pavement, as much as the blocks themselves, although as a very narrow strip.

But even if the gravel concrete could be made fine enough to be then pushed into the crevice between the old and the new block, as it would be no older than that forming the new block, it would be equally soft and plastic. It would not, therefore, constitute an intervening substance of a consistency or adhesiveness different from the substance of the new block, and it would practically form the selvage of that block. It would adhere to the old block just as fully as the rest of the new block would have adhered to it; and there would thus be nothing gained by the interposition of a portion of the concrete, separated from the new block, that would not result from the juxtaposition of the new block itself formed of the identical material.

As respects the mixture of sand and cement used by Cranford as a top course, the specifications of Schillinger nowhere allude to it; but, on the contrary, from the beginning to the end, Schillinger speaks of no other plastic com-

position than concrete. This is a combination which has been perfectly well known in the arts for more than two thousand years; which cannot be formed of sand and cement alone, but is composed of those substances mixed with gravel or pebbles or fragments of stones; or of pottery, as mentioned by Pliny. The composition spoken of by Schillinger is homogeneous throughout, with as much gravel at the top as at the bottom or center of the mass; and a stratum of sand and cement at the top is no more contemplated than a stratum of sand and gravel, or of cement and gravel.

In our opinion the "equivalent" contemplated by Schillinger was some flexible or manageable substance, such as tin-foil (which was properly held to be an infringement by Judge Shipman and enjoined as such in the case reported in the 14th Blatchford), or such other similar material as reasonably admits of the manipulation described by the patentee.

Second. The idea that the temporary interposition of an iron trowel is such an equivalent seems still less tenable. The strips, as long as they were used at all (see Creecy's testimony, p. 6), were left in the joints. The equivalent contemplated was to be something, according to the specifications, which was to be "arranged between the several blocks in such manner as to produce a suitable tight joint"—"which will constitute a tight water-proof joint." It is spoken of as "a material" equivalent to tar-paper, which is a description of a substance or matter out of which an article is formed (as the materials of a building), but not of an article itself, like a trowel, the product of a material.

If the contention be correct that the patent included the monopoly to form separate and movable blocks on the ground, then such formation would be an infringement whether made with one tool or another, and the use of the trowel would be objectionable, but not because it is the equivalent of tar-paper.

Third. Neither specification contains the slightest intimation that it ever occurred to the patentee that it was important to *control the cracks* in the blocks and prevent

them from running into the adjoining blocks, or that the patent was ever designed to effect that object. The entire statement about the cracks, as a separate point of importance, is an evident afterthought, which seems never to have suggested itself to Schillinger until after both specifications had been filed. As distinguished from the larger pretension of the monopoly—to make separate blocks—the pretension as to the control of the cracks has no existence in any of the claims connected with the patent.

Fourth. The most important contention of the complainants is the last; that the patent includes the formation of separate blocks of concrete on the ground, which can be taken up without injuring the adjacent blocks whether they are separated by tar-paper or its equivalent or by anything else.

It seems strange that the patentee, if he had this claim in his mind when he was making his first specifications, should have suppressed it, and only made a distinct claim to the combination in the joints of the several blocks of the strips of tar-paper or of its equivalent. Nothing could have been simpler than to have presented the claim. It is not pretended that this was done directly, but only that hidden within the other claim, is this one of overshadowing importance, which is only to be gathered from the lesser one by inference.

The first reference to this quality of the blocks or sections, is in the paragraph which states that his invention consists "in combining with the joints of concrete pavement strips of tar-paper, or equivalent material, arranged between the several blocks in such manner as to produce a suitable tight joint, and yet allow the blocks to be raised separately without affecting or injuring the blocks adjacent thereto." The statement assumes the existence of distinct blocks and their consequent separability. To say that separate blocks of concrete may be moved separately is as complete a truism in mechanics as to say that the bricks in a pavement may be taken up separately.

But he does not claim that quality as a new one then

first invented by him. He says his purpose is to combine with the joints of the several blocks, strips of tar-paper. But he no more claims to have originated one of the factors of the combination than the other. He does not claim to have invented tar-paper. But no more does he claim to have invented the fabrication of separate blocks. He takes them both as he finds them and combines them by a simple device. This combination he insists will produce "a tight joint," "water-tight." But, apparently unwilling to have it supposed that this joint is so closely united that it will destroy the natural separability of distinct blocks of concrete, he adds the precautionary words "and yet allow" (not that it will create or cause) but will *continue to permit*, the raising of the individual blocks without injuring the others.

In the same way, when the subject is again mentioned, it appears in the same connection as a denial that this efficient improvement or arrangement will make the joint so tight as to impair the movability of the blocks; and he therefore again insists, as we construe his language, that, effective as the tar-paper may be to make the joint even water-tight, still the quality of separability, necessarily belonging to distinct blocks when not placed so closely together, will remain with the blocks when divided only by a thin sheet of tar-paper. "But it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks." And in the next sentence he undertakes to justify this assertion by giving the reason why the adherence of the different separate blocks would not take place. "The paper does not adhere when placed against the edge of the fully formed block, and therefore the joints are always free between the several blocks, although adherence may take place between the paper and the plastic edges of the blocks which are formed after the paper joints are set up in place."

He alludes to this quality in separate blocks as he does to the common method of making concrete, which he ex-

plains at length, though known centuries ago. But he no more claims to have invented the one than he does the other. It seems to us that the language of Mr. Justice Woods in 114 U. S. Reports, p. 452, the case of *The Western Electric Telegraph Company against Ansonia Company*, is strikingly appropriate to this case. He says:

"But clearly a patentee cannot claim the benefit of an element of his invention thus vaguely hinted at. \* \* \* If he intended to include the cooling he has failed to describe it. Instead of describing the process he mentions the quality of it, and asks the court to infer the process from that quality. Such a vague and inverted method of description is not a compliance with the statutes. \* \* \* It has been held by this court that "the scope of letters-patent should be limited to the invention covered by the claim, and though the claim may be illustrated, it cannot be enlarged by the language in other parts of the specifications. *R. R. Co. vs. Mellen*, 164 U. S., 112. The element of the process under consideration cannot, therefore, be held to be covered by the patent. The contention that the patentee intended to include it in his process is evidently an after-thought."

We have been examining the question thus far with respect to the first specification and patent alone. It is proper to consider the effect of the new specifications and the reissue in connection with the disclaimer.

We are satisfied that no question as to the charge of fraud on the part of the patentee in obtaining the reissue can be considered in this action. But it is competent for the court to examine whether the reissue comprehends a new invention, and if it shall find such to be the case, to pronounce such new grant void.

In this case, as we have seen, the patentee admits that the reissue did include a claim not within the first patent, and by his disclaimer he expressly professed to renounce it. If the disclaimer was broad enough to withdraw every portion of the new claim, then nothing remains in the new patent except what was contained in the first issue.

If the disclaimer is not in fact as comprehensive as it was intended to be, so that any part of the new invention inheres in the reissue, then such part of the new matter is valueless and void.

The new matter introduced into the second specification, if it relates to the new invention and was introduced to illustrate and explain such new claim, must be discarded with the new invention itself, for the statute which requires that the reissue shall be only "for the same invention," is equally explicit in declaring that "no new matter shall be introduced into the (new) specification." Section 4916 Revised Statutes.

Only so far as the new matter can be fairly considered as introduced to explain and illustrate the first invention, apart from the new claim, should it be looked to in examining the extent and scope of the old claim. This would only leave properly for consideration any such explanations or illustrations as the patentee would have set forth originally in his application for the first patent, had he not omitted to do so "by inadvertence, accident or mistake, and without any fraudulent or deceptive intention." Section 4916.

Unless the operation of the new matter were to be thus limited, the patentee, under the new specifications, might obtain practically the benefit of the new invention which he has been compelled to abandon as void, by strengthening the old claim with statements only properly belonging to the new one, and which would never have been set out at all if the new claim had not been presented.

The new specifications contained an additional claim in these words:

1. A concrete pavement, laid in detached blocks or sections, substantially in the manner shown and described."

The manner in which this concrete pavement is laid is shown and described in the new matter introduced into the amended specifications.

The first paragraph following the reference to the drawings (which are substantially identical with those accompanying the first specifications) is in these words:

"This invention relates to a concrete pavement which is laid in sections so that each section can be taken up and relaid without disturbing the adjoining sections. In the joints of this sectional concrete pavement are combined strips of tar-paper or equivalent material arranged between the several blocks or sections in such a manner as to produce a suitable tight joint, and yet allow the blocks adjacent thereto to be removed," &c.

For the words in the corresponding paragraph in the original "this invention relates to pavements for sidewalks and other purposes," are substituted these words in the new specification:

"This invention relates to a concrete pavement which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining section."

And for the words "and consists in combining with the joints of concrete pavement strips of tar-paper," are substituted "with the joints of this sectional concrete pavement are combined strips of tar-paper;" and the words "or sections" are introduced further on after the word "blocks" in the original.

In the next paragraph, describing his manner of carrying out his invention, he inserts that he does not confine himself to any "definite" proportions or materials for making the concrete composition, and also these sentences:

"—one block being formed after the other. When the first block has set I remove the joist or partitions between it and the block next to be formed, and then I form a second block and so on, each succeeding block being formed after the adjacent blocks have set. And since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on; and when the pavement is completed each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips *b* of tar-paper or other suitable material in the following manner:

"For the sentence in the original:

"The paper does not adhere when placed against the

edge of the fully formed block, and therefore the joints are always free between the several blocks, although adherence may take place between the paper and the plastic edges of the blocks which are formed after the paper joints are set up in place."

—is substituted this:

"The paper, when placed against the block first formed, does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed after the same has been set up in its place between the joints."

And he appends, at this point, this final and additional paragraph of which there is no counterpart in the original:

"In such cases, however, when cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes while the blocks are detached from each other and can be taken up and relaid each independent of the adjoining blocks."

In our opinion scarcely any word of the new or altered parts of the specifications can properly be said to relate to the original claim. They were manifestly introduced to describe and explain the alleged new invention and never would have been presented but for the patentee's anxiety to secure that. It certainly, for example, would have been an extraordinary act of frankness for a patentee, in his application for the first patent (which we understand as comprehending only the combination of strips of tar-paper, or its equivalent, with separate concrete blocks), to have stated, as is done in the last paragraph of the new specification, that the tar-paper may be omitted where cheapness is an object, and that a sufficiently tight joint can be procured without interposing the particular material especially pointed out in the patent, or "anything" between the joints.

Discarding these new features of the specifications from the present inquiry, as not germane to the first patent, but



applicable solely to the second and invalid claim, we find what remains of the second specification to be merely a reiteration of all that is properly claimed in the first. In slightly changed language the improvement is still claimed as a combination. The use of the strips of tar-paper or equivalent material is still insisted on as making a water-proof joint; for the last paragraph which claimed for the first time that a "sufficiently tight" joint might be made by the fillings of sand or dust from the pavement, is distinctly withdrawn and obliterated from the specification by the disclaimer; and there is an entire absence of any expression tending to enlarge the range of equivalents for the selected material, which is described and ear-marked anew in words and on the plans in the same manner.

And while the new claim is a clear admission that the first patent conferred no monopoly in respect to the formation of separate blocks on the ground, and that he could only obtain that privilege by an enlarged invention, the language of the disclaimer practically admits that if that claim had been insisted on when the first application was made it could not have been sustained.

In the last specification the quality of separability is studiously included as the new claim and constitutes its distinctive and valuable feature; and this quality the patentee proposed to utilize only under the new claim.

But in 1875 he filed with the Commissioner the following disclaimer to portions of the reissue No. 4369, in which he set forth:

"That he has reason to believe that through inadvertence, accident or mistake, the specification and claim of letters-patent are too broad, including that of which your petitioner was not the first inventor; and he, therefore, hereby enters his disclaimer to the following words: "and since the concrete in setting shrinks, the second block when set does not adhere to the first, and so on," and which occur near the middle part of said specification: and to the following words near the end of the specification: "In such cases, however, where cheapness is an object, the tar-paper

may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other and can be taken up and relaid each independent of the adjoining blocks." "Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."

By this disclaimer he necessarily admitted that the public had the right to form the blocks alongside of each other on the ground; for in no other way could joints appear in the process of formation. Separate blocks made away from the pavement, like bricks at a brick-kiln, could have no joints in the sense referred to. In the language of Judge Blatchford, in 15th Blatchford, 152, *Schillinger vs. Gunther*, "It was not new to lay concrete pavements in sections. The plaintiff, after this suit was brought, filed a disclaimer, disclaiming any claim merely to the laying of a concrete pavement in detached blocks or sections without the interposition between the blocks or sections of the tar-paper or its equivalent, and admitting that it was not new to lay a concrete pavement in sections." And again, "nothing is claimed as new in respect of this," &c.

It is difficult to understand how the successive blocks could be formed without the interposition of something between the parts of the material designed to constitute the respective blocks. It is essential to the formation of the edges and joints that something should be introduced between the selected masses, harder than the material itself, or that pressure should be applied to retain the respective masses within the desired limits. This may be done by the hand of the workman, or by an instrument of wood or metal, as by a metal or wooden trowel or spade. It would be but a useless privilege to allow the workman to make the separate blocks and yet deny to him the right to use appropriate tools to form them. And having the

right to form them, he had the right to form them at such distance apart as should suit himself; and to preserve their separability while presenting the advantages of an unbroken pavement in any effectual manner, provided he did not infringe upon the device of Schillinger.

We see nothing, therefore, in the new specifications, when construed with the disclaimer, to change our opinion that the several claims of the complainants we have been considering are untenable; and hence we are forced to the conclusion that the pavements laid down by Cranford, as shown by the evidence in this cause, are not infringements of the Schillinger patent.

Each suit for infringement is to be tried upon the evidence produced in that case. It can only be some legal, or some important and well-established mechanical principle which can be imported from one case into another with controlling influence. Each individual suitor is entitled to have his suit tried only on the evidence adduced against him in his own case. As there is no such evidence before us of the state of the art at the date of Schillinger's patent as shows that what he was claiming was then unknown; we cannot accept the statements in law books that such evidence was offered in certain other cases as conclusive of the rights of the suitors in this cause.

Nor can we say that we are satisfied from the voluminous proofs in this case that the quality of separability imputed to Cranford's work by the complainants has been attained. The evidence is not satisfactory on the point, though the fact that Cranford's imitation of Schillinger (if shown to exist) has proved to be a bungling one in this particular, would not exculpate him from the charge of infringement if the complainants' construction of the patent were the correct one.

Schillinger, throughout all his claims, specifies "concrete" as one of the elements of his combination—a specific composition as old as the mechanic arts, possessing distinct properties. By his process he makes one block, instantly places along its edge the tar-paper or its equivalent mate-

rial, and forthwith pushes against the material thus placed in position a further quantity of the concrete to form the succeeding block. There is neither an interval of time or distance required. Whatever is to be interposed prevents the formation of a coherent mass, which, by virtue of the thing interposed, becomes two blocks instead of one block of twice the size.

In this mode of fabrication there can be no room for filling up a gap artificially made, or for making such a gap with a cutting instrument. Cutting such a gap presupposes that the two blocks of concrete had become united, which it was Schillinger's design to prevent. As described in the specification, as soon as Schillinger has built the successive blocks, with the tar paper or equivalent material interposed at the time, he has completed his pavement, in separate blocks, with waterproof joints, each block a homogeneous mass, with the gravel or similar hard substance of the concrete appearing in the texture of the surface. He has no need of a mixture of cement and sand, or for a trowel or a similar implement, and there is no possibility of using either, if the process he has described has been followed.

Cranford spreads the concrete across the bed of the pavement and drives the cleaver down into it at regular distances, and he has then a concrete pavement of disjoined blocks, which he has a right to make, formed by cutting across the subdivisions with the cleaver. As a concrete pavement, it is complete, though it is an inferior one, with crevices between the blocks. But his pavement is not designed to be a pavement of concrete alone; and it would be incomplete without a top coat of the plastic of cement and sand and water, and he proceeds to finish it by putting on that top coat.

In the process necessarily some portion of this substance sinks into the gaps below; and he cuts corresponding lines through the upper surface with a trowel, and marks the lines again with a jointer. If either the cement and sand, or the trowel, or the jointer thus temporarily interposed, were the equivalent of the tar paper when applied

to a *concrete* pavement in the combination, would such be the case when applied to a different pavement, not homogeneous throughout, like the concrete pavement of Schillinger.

The general principle of the patent law is, that "the omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. A combination is an entirety. If one of the elements be omitted the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement." Walker on Patents, sec. 349; *Vance vs. Campbell*, 1 Black, 430.

Again, in the same connection, "where a patentee states in his specification that a particular part of his invention is to be constructed of a particular material, and states or implies that he does not contemplate any other material as being suitable for the purpose, it is not certain that any other material will be treated by the court as the equivalent of the one recommended by the patent." Walker, sec. 349.

The language of the Supreme Court in *Sargent vs. Hall Safe and Lock Co.*, 114 U. S., 86, is in the same direction:

"In patents for combinations of mechanisms, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers. As was said in *Fay vs. Cordesman*, 109 U. S., 408, 420: 'The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his

own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.'"

In the words of the court in *Gould vs. Rees*, 15 Wallace, 187:

"Where the defendant, in constructing his machine, omits entirely one of the ingredients of the plaintiff's combination, without substituting any other, in the place of the one omitted, which is new or which performs a substantially different function, or if it is old, was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe."

According to our view Cranford's alleged "equivalent" performs an altogether different function from that designed to be performed by the strip of tar paper or equivalent material. Schillinger introduced the tar paper to make a tight waterproof joint and yet allow the concrete blocks he makes to move separately; while Cranford's blocks of concrete are already separate but too far apart for a neat pavement, and what he superadds has the effect to diminish the distance between them by filling the gap with the cement and sand. While forming what he claims is a smoother and better pavement, Schillinger admits, in the second specification, that the gaps between the separate blocks may be filled with sand and dust from the pavement without infringement. Why not with sand and cement?

We have examined the cases referred to, and all others which were accessible sustaining Schillinger's pretensions, and have been duly impressed with the weight of those authorities. But we have, notwithstanding, found ourselves unable to acquiesce in their conclusions, and the opinions formed separately by each of the judges joining in this judgment, have been strengthened by examination and consultation.

The first decision in order of time is that reported in 14th Blatchford, 152, *Schillinger vs. Gunther*, made by Judge

Shipman of the southern district of New York in February, 1877. An injunction had been issued to restrain the manufacture of pavements where tin foil had been substituted between the joints in lieu of tar paper; which the court held was clearly an infringement; and the case had been referred to a master for an account. Afterwards an application was made by the complainant for an attachment for contempt, alleging that the defendant was dividing the blocks by the temporary interposition of a trowel through the entire pavement. The court decided in favor of the complainant on the application for the attachment, and not upon a new bill; which latter course, in the language of the Supreme Court, in *California Paving Co. vs. Molitor*, 113 U. S., 618, "Is by far the most appropriate method where it is really a doubtful question whether the new process adopted is an infringement or not."

The same case came on again in October, 1878, before Judge Blatchford, as circuit judge, upon exceptions to the master's report (15th Blatchford, 303). The only points stated in the head note of the decision as settled in that case, relate to the mode of estimating the damages. But although the learned justice discussed to some extent the features of the patent, the case cannot be considered as a distinct affirmance of the general doctrine laid down by Judge Shipman on allowing the attachment. Indeed portions of the opinion (among others, those parts we have quoted above) would rather seem to be in opposition to the contention of the patentee.

In August, 1879, a case between the same parties was again before Judge Blatchford (17th Blatchford, 66). The head note of the case, prepared by the judge the reporter, or under his direction, states that the points decided were, that a concrete pavement made where it is to be laid, is not anticipated by a pavement made of similar blocks made elsewhere and then laid where they are to be used; and further, that the several objections interposed in that case to the efficiency and regularity of the disclaimer were untenable; but the learned judge states in

the opinion, that the question of infringement by the use of a trowel or knife had been disposed of by Judge Shipman in that case.

In May, 1881, Justice Sawyer, of the California circuit decided the cases of *The California Artificial Stone Co. vs. Molitor and Perine*, 7 Sawyer, 190. The complainants were the assignees of the Schillinger patent and sued for an infringement.

The learned judge commences with the statement that the patent had been before him on several occasions, and he had experienced considerable difficulty in giving it a satisfactory construction; that it had been before Judges Blatchford and Shipman at various times, and that they had given it a construction wider in its scope than he thought, on first examination, it would bear. Expressing his reluctance to dissent from those distinguished jurists, and, as it seems to us, very much in deference to their decisions, he delivers an elaborate opinion sustaining the essential features of the complainants' claims as presented in the present case.

In the southern district of Ohio, Judge Sage decided (in *Kuhl vs. Meuller*, 21st Federal Reporter, 510), that the patent was infringed by a construction where the cement was laid in a solid mass and the surface was marked off by a fish line or trowel, into blocks. But he appears entirely to base his decision upon those of Judges Shipman and Blatchford, and the first decision of Judge Sawyer.

In July, 1883, Judge Blatchford again had the patent under consideration in 21 Blatchford, 383, *Schillinger vs. Greenway Brewing Co.* He refers to the former decision in the Gunther case and to the case in 7th Sawyer, and decides distinctly that the pavement of the defendant there complained of, and which was laid substantially as Cranford lays his, is an infringement.

Judge Blodgett, of the southern district of Illinois, in the case of *Schillinger vs. Hurlburt*, adopts the decisions before referred to in a case where he states the facts are similar; although he says if the question were before him



as an original one he would have great doubts of its validity on the ground of novelty.

These are all the decisions we have found sustaining the patent. If there are others they have not been placed before us, or discovered in our researches.

On the other hand we have been referred to the case of *Schillinger vs. Weber*, decided in May, 1879, by Judge McKennan, circuit judge for Pennsylvania. The defendant's process, as appears from his answer, was substantially the same as that pursued by Cranford, although there were some unimportant differences as to the material and its manipulation. The judge refused an injunction and dismissed the bill, thus denying that the defendant was guilty of infringement.

To the same effect was the decision of Judge Butler, of the eastern district of Pennsylvania, in the case of the *Vulcanite Paving Co. vs. Keystone Artificial Pavement Co.*, and Krause and others. Unfortunately no written opinion was given in either case, and there have only been produced before us the statements of counsel engaged on both sides of the cases explaining the grounds of the decisions. We understand the judges construed the patent as we have done; and held further that if it were designed only to comprehend the separation of blocks, on the ground, the patent would be void for want of novelty.

The patent was again before Judge Sawyer in January, 1883, in the case of the *California Stone Co. vs. Freeborn*, reported in 8th Sawyer, 443. In that case the judge adhered to his decision in 7th Sawyer, which, as we read it, evinced rather a yielding to the authority of the New York cases than the abandonment of his own original opinion as to the extent of the patent. But he proceeds to say: "It is claimed that running the marker along the line between the old and new blocks on the surface after forming the latter is an infringement. I am not able to take that view. I have gone as far in that direction as I think the patent will justify. I think in that particular it is not an infringement. Counsel for complainant have made a point

as to simply marking lines upon the surface, of the block with the marker employed. There is one case wherein it is held that marking the surface with a fish line is an infringement. It is insisted by complainant that marking off the blocks on the surface at the time of laying the pavement with a marker about one-sixteenth of an inch in depth is an infringement. I am unable to perceive that the running along the surface of that blunt and rounded marker one-sixteenth of an inch in depth, there being no cutting elsewhere in making a joint,—I fail to see that that is an infringement."

It seems to us this language evinces a disposition on the part of the learned judge to return to his own original conception of the proper restricted scope of the patent, and his ruling in the case last referred to is much within the wide claim made for the patentee in the argument before us.

The only case in which this patent has been before the Supreme Court of the United States is reported in 113 U. S., 609., *California Paving Co. vs. Molitor*.

After the decree in 7th Sawyer, an application had been made to the California court for an attachment for an alleged violation of the injunction. The breach consisted, as stated by Mr. Justice Bradley, "in making a mark or indentation on the surface whilst in a plastic state with a trowel or marker, extending to the depth of from one-eighth of an inch to an inch, and thus giving the pavement the appearance of being made in detached blocks, and, in fact, answering all the purposes of detached blocks, the crease on the surface being sufficient to produce the results obtained by the Schillinger patent. Of course," continues Judge Bradley, "the question was at once raised whether the process now used by the defendant was an infringement of the patent. The judges being opposed in opinion, a decree was made in conformity with that of the circuit judge, declaring that the pavements thus constructed by the defendant did not infringe the patent; that there was no violation of the injunction, and that the order to show cause be discharged."

This application had been made more than two years after

the decree in 7th Sawyer and nearly a year after the decision in 8th Sawyer, and we find the circuit judge in conformity, or we think, with the disposition evinced in his judgment in 8th Sawyer, now holding that to be no infringement, which the Schillinger assignees were insisting was a clear breach of the injunction. From this decree Schillinger's assignees appealed. In the Supreme Court a motion was made to dismiss the appeal, which was granted, the court saying:

"Whether the new pavement, constructed in Redwood City, is an infringement or not, is just as much a mixed question of law and fact (as the case is presented to us) as was the question whether the pavement formerly constructed by the defendant was an infringement. It is a question which the Circuit Court must decide for itself in the ordinary way. If the judges disagree there can be no judgment of contempt and the defendant must be discharged. The complainant may then either seek a review of that decision in this court, or bring a new suit against the defendant for the alleged infringement. The latter method is by far the most appropriate where it is really a doubtful question whether the new process adopted is an infringement or not."

If the Supreme Court had considered Schillinger's construction of the patent as *res judicata* under the New York decisions, it seems more than probable it would have put a stop to further litigation by saying so (for this point seems to have been earnestly insisted on before it), instead of suggesting an appeal, or a new suit, to settle the extent of the patent.

The two cases referred to by the complainant as decided in this court cannot be regarded as authority. They were brought and settled before the disclaimer was filed; and moreover it is apparent they were not really contested. Creecy, in his evidence before us, states that one of the defendants in one of the cases afterwards joined in the Schillinger enterprise; which the witness relies on as an admission by that defendant of the validity of Schillinger's claim.

But this act may equally be considered as evincive of collusion to obtain a favorable decision for a confederate, after a feeble show of defence.

It has been urged by the defendant that the patent should not be sustained for want of patentable novelty.

If the proper scope and object of the patent had really been only to secure a monopoly to divide the concrete mass on the pavement into separate blocks, so that they might be moved without disturbing the adjoining blocks, and to prevent the spreading of cracks, by the intervening joints, we are disposed to agree with Judge Blodgett that the claim would not present the feature of a novel and useful invention.

A workman may complete the separation of his material into paving blocks at his workshop, whether that be distant from the place to be paved or very near it; and why not make the separation on the pavement itself? If he sees fit to spread the entire mass in a layer of proper depth across the space to be paved, we see no reason why he may not, undisturbed by any patent, subdivide the mass on the ground into two, or fifty, sections or blocks, as may suit his fancy, by any suitable instruments.

But if the instrument used is thin, and the mass is soft, the chances are that the blocks would reunite. On the other hand, if the consistence is stiffer and the instrument wide, the gaps might remain open; and a wide opening would expose the blocks to disintegration from the rain and frost. It would readily occur to the workman to guard against both those dangers by the interposition of a substance that would keep the blocks apart when severed, while forming a tight joint. But any ordinary and cheap material, like strips of wood, would soon decay and shrink, and thus leave a rough pavement; while the use of more lasting substances, such as a line of bricks on edge, or a strip of stone, or thin strips of metal (even if the plastic material should adhere to them with sufficient closeness to make a tight joint), would prove too expensive for popular use. And while either of these plans would equally "allow" the

blocks to be moved separately, and prevent the spreading of cracks, it seems hard to say that either would present a patentable novelty or any feature of a useful invention.

But if the patent of Schillinger is to be construed as we have concluded it should be, we recognize in it a novel and useful device which, by an easy and simple method, might overcome these difficulties that might arise from the separation of the blocks on the pavement in more obvious methods; viz., by the interposition of *strips of tar-paper*, so thin that there could be no such wide gap as would admit the rain; and to which the plastic material would sufficiently adhere, while indestructible and cheap enough to recommend its use.

The invasion of every department of life by the daily increasing number of unnecessary patents is becoming a serious tax upon the public. The amusing complaint of Sidney Smith of the universality of taxes in England may well be applied here to this grievance. From the safety pin of the new-born infant to the "casket" that receives the octogenarian, almost everything we use pays tribute to the patentee, and frequently for devices that might well suggest themselves to any quick-witted housewife or intelligent mechanic.

A justice of this court while recently announcing an opinion overruling an application for a proposed highly important improvement in the method of lengthening and shortening the cords for hanging pictures, read his notes from a patented paper-pad, written with a patented pencil; while the ink, pens, penholder and block of india rubber before him, all bore the mark of patentees. Several articles of his clothing were also patented, down to the hem of his garments, which were bound by strips of gutta percha, duly patented. And these probably were but a small part of the articles in the room thus paying a duty to patentees.

The courts have been admonished by the decisions of the Supreme Court in the Slawson Fare box case, and in many others similar in character, that the proper policy of the law is to limit rather than to amplify the extent of such

claims, and this consideration has not been without influence in our examination of this subject.

It is unnecessary to add the observations made when the decision was announced, upon other points argued before us.

In our opinion the decree below should be reversed, and it is so ordered.

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WILLIAM A. MELOY *vs.* ALBERT GRANT.

LAW. No. 25,658.

{ Decided March 22, 1886.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. Where judgment is rendered by default for want of a plea the motion to strike it out may be granted under the 72d rule of court.
2. But where the judgment is rendered for failure to comply with the 73d rule, the motion to vacate it must be under the 90th rule.
3. An order vacating a judgment by default under the 72d rule is not appealable.

Appeal from an order vacating a judgment by default.

STATEMENT OF THE CASE.

This case involves a question of practice under the 72d, 73d and 90th rules of court which are as follows:

"RULE 72. If the defendant, served with copies of the declaration, notice to plead and summons, fail to appear and plead according to said notice, a judgment by default for non-appearance may be entered against him at the appearance term by the circuit court, or at special term, which judgment may be set aside during said appearance term, or within the first four days of the next trial term, upon the defendant's offering a plea, verified by his affidavit, setting up a defence considered by the justice sufficient, if proved, to bar the action in whole or in part.

"RULE 73. In any action arising *ex contractu* if the plaintiff or his agent shall have filed at the time of bringing his

action an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defence, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, an affidavit of defence denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defence which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.

"RULE 90. *Motion to vacate judgment.* This motion will not be entertained if made after the defendant has taken any fresh step after the knowledge of the irregularity, or surprise, or fraud, or deceit complained of; nor can it be made after execution executed unless the defendant had no notice of the judgment.

"The motion must be in writing, and the grounds upon which it is founded must be sworn to by the mover and supported by affidavits or otherwise, as he may be advised; and a copy of the motion and accompanying papers must be served on the opposite party at least four days, Sundays excepted, before the day fixed for the hearing."

On the 6th of October, 1884, plaintiff caused a copy of the summons, declaration, notice to plead and of his affidavit setting out his cause of action and the sum claimed to be due, exclusive of all set-offs and just grounds of defence, to be served on the defendant personally.

On the 10th of November following, the defendant's appearance and plea being overdue, the court, on motion of plaintiff, entered judgment for the defendant for the amount claimed to be due.

The next trial term of the court opened on the 26th day of January, 1885. On the fourth day after the defendant offered a plea and affidavit and moved the court to vacate the judgment and allow him to file the plea, which was done.

The plaintiff appealed from the order.

WILLIAM A. MELOY for plaintiff.

S. S. HENKLE for defendant.

Mr. Justice MERRICK delivered the opinion of the court.

This is an appeal taken from an order of the circuit court vacating a judgment by default for want of a plea, on the fourth day of the succeeding term, and allowing the defendant to plead to the merits of the action.

It is contended, on the part of the appellant, that the judgment was obtained under the 73d rule of court which provides for judgments by default in actions *ex contractu* where there has been an affidavit to the cause of action, and that it does not come within the terms of the 73d rule, but that the only mode of vacating a judgment, rendered under the 73d rule, is under the provisions of the 90th rule.

But it seems that the judgment could not have been rendered in this case under the 73d rule; that is, for want of a plea and affidavit of defence, for it was simply a judgment by default for want of a plea. It fell, therefore, entirely within the provisions of the 72d rule, which allows a motion to be made to strike out a judgment by default for want of appearance at any time within four days of the next succeeding term where the pleas are presented in proper form with a proper affidavit of merits.

That was done in this case. Within the first four days of the succeeding term the defendant came into court and complied with the requirement of the rule by offering his plea supported by a sufficient affidavit.

The court is of opinion that, under such circumstances, the case falls within the 72d rule. If the judgment had been because the plea was without an affidavit of defence, or because the affidavit was insufficient under the requirement of the 73d rule, then the judgment could not have been struck out except for cause shown in the manner provided in the 90th rule. But the judgment, as a



judgment by default for want of a plea, stood entirely within the letter as well as the spirit of rule 72, just as in any other case of default for want of a plea. So that the party was entirely within time and it is nothing more than right and just that, in conformity with the terms and the spirit of the rule, he should have leave to plead and make the substantial defence which he has sworn is capable of being made in the case. The judgment below is therefore affirmed. Perhaps it might be proper to say that inasmuch as the application was to the discretionary power of the court, it is not an appealable case at all but that the appeal ought to be dismissed.

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THE UNITED STATES vs. RICHARD J. LEE.

{ Decided March 15, 1886.

{ The CHIEF JUSTICE and Justices COX and MERRICK sitting.

CRIMINAL DOCKET. No. 16,126.

1. A prayer not founded upon any evidence in the case should be refused.
2. The barbarous manner in which a homicide was committed does not of itself furnish any basis for the defence of insanity.
3. An instruction to the jury which rests upon the idea that there is a grade of insanity not sufficient to acquit a party of manslaughter, and yet sufficient to acquit him of murder, should be refused; the court does not recognize such a distinction in the forms of insanity.
4. On a motion for a new trial it is no ground of objection to a person as a juror that the law exempts him from jury service; he is not disqualified thereby, and, it being a personal privilege, he may waive it.

STATEMENT OF THE CASE.

Indictment for murder; conviction; appeal, and judgment affirmed.

The facts of this case, as gathered from the bill of exceptions, are as follows:

The defendant's wife, Mary Lee, with her two children, were living at the house of a married sister, in the city of Washington. The defendant and his wife had lived apart for three months prior to the day of the killing. The cause

of the separation being cruel and inhuman treatment of his wife by the defendant.

At about eight o'clock in the evening (the day of the killing) the defendant visited his wife, remaining with her about half an hour. The conversation was not unfriendly until the defendant, in reply to a remark made by his wife, called her a liar. Thereupon he was requested by his sister-in-law to go away. He immediately did so, first apologizing for his offensive remark to his wife. Several persons who were in the same room at the time, or in the adjoining room, testified that at this time the defendant acted naturally and did not seem to be under the influence of liquor.

The immediate circumstances attending and following the homicide in question were as follows:

About half past eight o'clock on the same evening the defendant endeavored to borrow a pistol from a friend of his. He did not succeed in getting a pistol at that time. About half past nine o'clock he went again to the house where his wife was and endeavored to open the door, which had been locked to keep him out. The door not being opened upon his demand, he forced it open, entered the house, and at once began an indiscriminate attack upon the inmates of the house by shooting at them with a revolver. His wife fled from the house. He ran out after her. She screamed as she ran and begged him not to kill her. He replied: "God damn you, I will kill you." Having chased her in this way several hundred feet he fired one shot at her. She still ran on and he followed and finally overtook her within the length of an ordinary city block from the house where she lived. He then struck her twice on the head with the revolver, inflicting severe wounds, and finally put his revolver to her body and fired another shot. He left her at once and went to a drug store in the vicinity and asked if he could purchase some cartridges. Receiving a negative answer he went on. Meeting an acquaintance he told him he had killed his wife and her sister, and that if he could have gotten some more cartridges he would have gone back and killed

"the whole damned kit of them." To another person a few moments later he said he had killed his wife and was going to be hanged for it. About eleven o'clock the same night the defendant was arrested by several policemen. On the way to the station house he was informed that his wife was dead; whereupon he said he had been assaulted with an axe by his wife's sister.

All the witnesses who testified to seeing the defendant after the shooting said that he seemed to be not drunk, but "as though he had been drinking."

Mary Lee died about half an hour after she was shot by the defendant.

In defence no testimony was offered as to the actual killing, or as to what occurred when the defendant made his first visit to his wife on the evening in question. But several witnesses were examined on behalf of the defendant, whose testimony, it was claimed by his counsel, tended to prove that at the time of the killing the defendant was wholly or partially insane.

This testimony tended to show that for several weeks prior to the day of the homicide, and on that day, the defendant had been distressed about his separation from his wife and his inability to get her to return to live with him, and had threatened to kill himself; that he loved his wife; and that throughout the day of the killing up to six o'clock in the evening he had not been in his usual state of mind. One of these witnesses said he acted "very funny," and that it seemed to her "like he was crazy." Another witness said that on that day the defendant acted like a maniac. Two others testified that on that day the defendant spoke to another woman under the impression apparently that she was his wife, and said to her, "Mamie, come back and live with me."

Several of the defendant's witnesses also testified that for several weeks immediately prior to the homicide the defendant had been drinking intoxicating liquor frequently, although he did not seem to be drunk.

No witness testified that in his or her opinion the de-

fendant was insane, except as above stated, and none said that in his or her opinion the defendant was unable to distinguish right from wrong, or to refrain from killing his wife, or to know that to kill her was against the law. No question was asked any of the witnesses on those points.

There the defence rested.

In rebuttal the Government offered to the jury evidence tending to prove that the defendant had never been of unsound mind.

This was all the evidence in the case.

Thereupon counsel for the defendant requested the court to instruct the jury as follows:

"If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong, yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter."

But the court refused to give such instruction, to which refusal the defendant's counsel excepted.

No exception was taken to the charge of the court to the jury.

Verdict, guilty as indicted.

A motion for a new trial was then made on the principal ground that one of the jurors who sat in the case was disqualified under the provisions of section 875 of the Revised Statutes of the District of Columbia, he being at the time in the employ of the United States and the District of Columbia as a watchman in the engineer department, District of Columbia, appointed by the Commissioners of the District of Columbia, and in receipt of an annual salary of \$480, paid out of the Treasury of the United States, all of which was discovered after the trial, and could not have been ascertained by reasonable diligence before the trial.

By section 875, Rev. Stat. D. C., it is provided that "All salaried officers of the Government of the United States \* \* \* shall be exempt from jury duty, and their names shall not be placed on the jury-lists."

The motion for a new trial being overruled, the defendant went to the General Term on appeal and on the exception taken at the trial.

JAMES W. WALKER and THOMAS C. TAYLOR for defendant:

"A man may have capacity to be responsible for manslaughter, but not to be responsible for murder." Wharton's Med. Jurisp., vol. 1 sec. 151.

"All peculiar traits may be put in evidence to lower the grade of the offence, though they do not amount to insanity." Whart. Med. Jurisp., sec. 200.

"Partial insanity may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused." Stev. Cr. Law (1863), sec. 92.

A. S. WORTHINGTON for the United States:

The only question raised by the bill of exceptions in this case is substantially whether, upon evidence tending to show mental unsoundness, a jury may reduce the grade of a homicide to manslaughter if they find such evidence insufficient to prove insanity, or to disprove that the person accused knew right from wrong.

It will be observed that there was no evidence in the case that tended to prove insanity in the legal sense.

In jurisdictions where murder is divided into two degrees—murder in the first degree requiring deliberation and premeditation; in other words, actual malice—it has been frequently held that evidence of mental excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter. On this

point see *Jones vs. Com.*, 75 Pa. St., 403; *McIntyre vs. People*, 38 Ill., 520; *Rafferty vs. People*, 66 Ill., 118; *People vs. Rogers*, 18 N. Y., 27; *Com. vs. Hawkins*, 3 Gray, 463; *People vs. Balencia*, 21 Cal., 544; *Pirtle vs. State*, 9 Humph., 663; *Haile vs. State*, 11 Humph., 155; *Hanvey vs. State*, 68 Ga., 614; *Tidwell vs. State*, 70 Ala., 33; *Willis vs. Com.*, 32 Grat., 928.

The record is somewhat confusing as to the question sought to be brought here by appeal from the refusal of the court below to grant a new trial; but it may be conceded, for the sake of the argument, that one of the jurors who convicted the defendant was also employed as set out in the motion.

But section 875, while it exempts persons from service, does not disqualify them. Section 872 specifies what persons shall be incompetent to act as jurors, namely, those who are not citizens of the United States; those who are not residents of the District; all persons under 21 and over 65 years of age; and those who have been convicted of any crime involving moral turpitude.

Chase was in the employ of the District of Columbia, not of the United States. The very section in question, after excusing salaried officers of the United States, goes on to excuse commissioners of police and persons connected with the police or fire department.

"Officers of the Government of the United States" are those appointed by the President or the head of one of the Departments. *U. S. vs. Germaine*, 99 U. S., 508.

The motion for new trial was addressed to the discretion of the court; it should have been supported by the affidavit of the defendant himself that he had no knowledge of the alleged disqualifying fact till after verdict; and a motion for a new trial on the ground of newly-discovered evidence of the incompetency of a juror will not be granted when the court that hears the evidence is satisfied on the whole that justice has been done. *Thompson & Merriam on Juries*, sec. 302.

Mr. Justice MERRICK delivered the opinion of the court.

This was an appeal from the Criminal Court where there was an indictment and conviction of murder, the defendant exexcepted for error in the refusal by the court of an instruction and also made a motion for a new trial upon the ground that one of the jurors was incompetent. The instruction which he prayed, and which was refused, is in these words:

"If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter."

The first criticism to be made upon the application for the reversal of the judgment of the court below in refusing this prayer is, that there was no evidence whatsoever upon which to found the prayer. There was no suggestion of any insanity on the part of the defendant, and no evidence tending to prove in any manner that he was insane; and the only ground upon which it was argued here that a prayer of that sort should be granted was because the offence was a very barbarous one in itself.

The authorities are explicit that the barbarous manner in which a homicide is committed does not in itself furnish any basis for the defence of insanity. But above and beyond that the prayer is inconsistent with itself—is incongruous and radically vicious. It rests upon the idea that there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

The law does not recognize any such distinction as that

in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it.

There is another objection made upon the motion for a new trial to the effect that one of the jurors was incompetent to sit because he had been the holder of a subordinate office under the District of Columbia. The jury law exempts from service on juries parties who are engaged in public office, whether on the part of the Government or on the part of the District of Columbia. It exempts other classes of persons also from jury duty, but the persons exempted are not disqualified as jurors. It is simply the privilege of the party to become exempt from jury service on account of other engagements. But he has the capacity—the faculty to be a juror. It is his own personal privilege, and he alone is the party who shall take advantage of it. If he pleases to waive that privilege he is still a competent juror, and he has all the functions and powers which the law imputes to a man as necessary to constitute one of the twelve triers of an accused. This objection, therefore, affords no ground upon which a motion for a new trial can be sustained.

This subject has frequently been before the courts and



the doctrine is very thoroughly and conclusively established. It is laid down in Bishop on Criminal Procedure in the third edition at section 886. But the most recent case in which the subject has been exhaustively considered and all the authorities of all the States brought together, is to be found in the case of Green against The State, reported in 59 Md., 123. There the Court of Appeals reviews all the decisions both in England and in this country upon the subject, and it needs only to refer to that case for the sufficient reasonings upon which they maintain and confirm the justice of the rule of law that where a person is exempted from service on a jury he is not thereby disqualified. It is his personal privilege only, and unless he please to take advantage of it, it cannot be taken advantage of on a motion for a new trial.

Those were the only two objections, presented why the judgment of the court below should not be affirmed by this court, and finding no sufficient cause for reversing the judgment upon either of these reasons, it will be affirmed.

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ANDREW J. CONNICK ET AL. vs. ROBERT MORRISON.

{ Decided March 22, 1886.  
{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

LAW. No. 26,251.

An affidavit of defence under the 73d rule is insufficient when it amounts to no more than a change in terms of the plea, and does not state any specific defence or give any specific warning to the plaintiff of what the defendant means to rely upon for the purpose of defeating the claim.

Appeal from a judgment for want of a sufficient affidavit of defence under the 73d rule of court.

STATEMENT OF THE CASE.

The declaration consisted of the common counts with a

bill of particulars annexed, and with this was filed the following affidavit:

"STATE OF NEW YORK,  
City & County of New York. } ss.

"Before me, a notary public, duly commissioned and authorized to administer oaths, personally appeared Edwin Bouton, who, being duly sworn according to law upon his oath, says that he is a member of the firm of Connick & Bouton, and is one of the persons named as plaintiff in the annexed declaration; that said firm is composed of Andrew J. Connick and deponent, and that said firm has a cause of action against Robert Morrison, the person named as defendant in said declaration; that said cause of action consists of a book account for goods and merchandise sold and delivered, and work and labor done, and materials furnished by the said Connick & Bouton, for the said Robert Morrison, at his request, as is more fully set forth in the annexed declaration and bill of particulars, and that the sum claimed by the said Connick & Bouton herein and in said declaration, to wit: \$175.00, with interest, as set forth in the declaration, is justly due to the said Connick & Bouton from the said Robert Morrison, exclusive of all set-offs and just ground of defence.

"EDWIN BOUTON.

"Sworn to and subscribed before me this 23d day of June, 1885.

"[SEAL.]

LOUIS BECKHARDT,  
"Notary Public, New York Co."

The defendant pleaded:—

1. "That he never was indebted as alleged.
2. "That he did not promise as alleged.
3. "And for a further plea says that, before this action was commenced, he, by payment, discharged the plaintiff's claim."

To this was annexed the following affidavit:

"I, Robert Morrison, on oath, say that the foregoing

pleas are correct and true, and I deny the plaintiffs' right to recover from me the amount claimed in their declaration, or any other sum of money from me; that, while the plaintiffs were said to have an existence as a firm, I had dealings with them down to about January 19, 1883, and purchased clothing from them at different times, and have paid them in full all that I ever promised or that I owe them.

"ROBERT MORRISON.

"Subscribed and sworn to before me this 14th day of August, A. D. 1885.

"A. K. BROWNE,  
"Notary Public, D. C."

The plaintiff thereupon moved the court for judgment for want of a sufficient affidavit of defence which was granted. The defendant appealed.

MILLS DEAN for plaintiff:

The defendant's pleas and affidavit taken together do not set forth specifically and in "precise and distinct terms" a defence to the plaintiff's action.

He is sued for the price of certain specific articles which are described in the bill of particulars to a degree of particularity; the date of sale and delivery is given. If he did not buy the articles, or if he has paid for them, it was an easy matter for him to say so, but he contents himself with filing inconsistent pleas, swearing that they are "correct and true," and then goes on and says he had dealings down to about January 19, 1883 (the date of the alleged sale and delivery), and claims to have paid in full all he ever promised or that he owed.

In *Bank vs. Hitz, Mac A. & Mackey*, 200, the learned Chief Justice says of the 73d rule:

"Now what does the rule mean, this being its office?

\* \* \* It says that the defendant shall set out his grounds of defence and swear to them."

The defendant has not done this. The court does not

know whether the defendant will claim at the trial that he never got the goods, that the plaintiffs gave them to him, or that he has paid for them. Under the first plea he might deny ever having received the goods; under the second plea he might claim the plaintiffs gave him the goods, and under the third plea he might claim that he paid for the goods. He swears that all the pleas are true, but nowhere gives the grounds of his defence; he nowhere denies that the plaintiffs sold and delivered the goods charged in the bill of particulars; he nowhere claims that he has paid for the goods sued for.

What, then, are his grounds of defence?

The object of the 73d rule is the same as that of a plea, *i. e.*, to inform the court of the nature or grounds of the defence, and the defendant here has wholly failed to set forth his grounds; he leaves us as much in the dark as we would be if he had filed only the plea of *non-assumpsit*.

The pleas and affidavit must be taken as a whole; the affidavit treats the pleas as the "record of facts" (see *Bank vs. Hitz, supra*), and taken together they only set up "a vague and general denial," and fail to show "the particulars of the defence relied upon." See *Ford vs. Cornish*, 2 Mac A., 59.

A. K. BROWNE and T. Q. HILDEBRANT for defendant:

In support of his plea, the defendant files his affidavit that the averments of the plea are true, and while it is not artistically drawn, it in substance complies fully with the requirements of the rule as interpreted in the case of *Ford vs. Cornish*, 2 Mac A., 57.

Taking the plea and affidavit together, it is difficult to see how payment could be more strongly pleaded. It is stated: "I had dealings with them down to about January 19 (the date of this bill), and purchased clothing from them at different times, and have paid them in full all that I ever promised or that I owe them." The court will construe this plea according to the plain meaning of the

words used, that the defendant states he has paid all he ever promised, and all he ever owed the plaintiffs.

Rule 29 says: "Every plea shall set forth the true defence upon which the defendant supposes he may defeat the plaintiff's action. It may deny all or any particular mentioned allegation of the declaration, or it may confess and avoid," &c.

The defendant in this case has denied the promise, denied the indebtedness, and averred, in as plain language as can be used, that he has paid the account on which suit is brought. "I have paid them in full all that I ever promised to pay or ever owed them." Could language be more explicit? Will it be held that he should have specified the time, date of payment, the place where paid, the kind of money paid, the individual member of the firm to whom it was paid, whether by check, gold, currency, or otherwise? Such a claim would be the climax of absurdity. What else than he has stated could he state unless he gave such particulars? We submit that rule 73 does not require a more specific statement. The plaintiff is entitled to judgment, "unless the defendant shall file, along with his plea, an affidavit of defence, denying the right of plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defence, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

"I have paid them in full all that I ever promised or ever owed them." If this is not stated in distinct and precise terms, we do not understand the meaning of the words. It will not be claimed that if the statement is true the plaintiff can recover in this case. If true, it certainly defeats the action.

Mr. Justice MERRICK delivered the opinion of the court.

This was an appeal from a final judgment rendered by the circuit court under the 73d rule for the deficiency of the affidavit of defence under that rule.

The party pleaded "never indebted," that he did not promise, and that, before the action was commenced, he, by payment, discharged the claim, and then he made an affidavit under it in these words :

"That the foregoing pleas are correct and true, and I deny the plaintiff's right to recover from me the amount claimed in their declaration, or any other sum of money from me ; that while the plaintiffs were said to have an existence as a firm I had dealings with them down to about January 19, 1883, and purchased clothing from them at different times, and had paid them in full all that I ever promised or that I owe them."

The rule requires that, along with the pleas, there shall be a specific statement of defence. Now it is quite apparent upon reading this affidavit that it is no more than a change of the terms in the plea, but does not state any specific defence or give any specific warning to the plaintiff as to what the defendant means to rely upon for the purpose of defeating the claim. It is a matter entirely free from doubt in the mind of the court that this affidavit which I have read does not conform to the spirit and requirement of the rule, and therefore the judgment of the circuit court must be affirmed.

## THE UNITED STATES vs. ANTONIO NARDELLO.

CRIMINAL DOCKET. No. 16,048.

{ Decided March 22, 1886.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. Section 812 of the Revised Statutes of the United States which disqualifies any person from serving as a juror more than once in two years, does not apply to the courts of the District of Columbia. The provision upon that subject governing this District is to be found in section 861 (as amended) of the Revised Statutes of the District of Columbia, and by that section only one year need elapse.
2. A person summoned as a juror for the criminal court stated "that his home is in Virginia; that his parents live there; that he returned there when out of employment elsewhere; that he votes there; that for the past fifteen years he has been spending his vacations (about two weeks in the summer of each year) at his home there; that, excepting said two weeks in each year he has resided in Washington, D. C., during all that time as the agent of the V. M. R. R. Co., a Virginia corporation. That his only residence here is as agent for said corporation; that he has never been married, and that he has no present intention of leaving the employ of said company and returning to Virginia."
- Held*, A competent juror within the provisions of section 872 of the R. S. D. C., which requires jurors to be residents of the District
3. A declaration accompanying and explanatory of an act indefinite in itself is always admissible as part of the *res gestae*. Thus where the murdered man, when last seen alone had been asked, whither he was going, and replied "To look for N." (the person charged with the murder), it was *held* that this statement was not within the rule against hearsay.
4. In the absence of any specific threat or promise, the question whether evidence of a confession is admissible is one to be left in a very large degree to the judgment and discretion of the judge who presides at the trial.
5. The circumstances under which three confessions were made by the accused at different times during the same day considered and commented on by the court and the ruling of the court below in excluding the first and admitting the others approved.

Indictment and conviction of murder.

The Case is stated in the opinion.

GEORGE B. CORKHILL and THOMAS M. FIELDS for appellant:

The court erred in overruling the objection of defendant's counsel to Watson. Sec. 812, R. S. U. S.; sec. 93, R. S. D. C.

McDaniel was a non-resident of the District, and therefore incompetent to sit as a juror. Sec. 872, R. S. D. C.

A resident is defined to be one who has his residence in a place. Bouv. Law Dic., Tit., Resident.

Residence is defined to be a personal presence in a fixed and permanent abode. Bouv. Law Dic. Tit., Residence; *Roosevelt vs. Kellogg*, 20 Johns. N. Y., 208; *Thorndyke vs. City of Boston*, 1 Metc., 242; *In re Wrigley*, 4 Wend., 602; *Porter vs. Miller*, 3 Wend., 329; *Sears vs. City of Boston*, 1 Metc., 250; *Harvard College vs. Gore*, 5 Pick., 376.

Residence indicates permanency of occupation as distinct from lodging, or boarding, or temporary occupation. 19 Me., 293; 3 Greenl., 229; *Frost vs. Bisbin*, 19 Wend., 11.

*In re Fitzgerald*, 2 Caines, 318, it was held that a resident within a State was one who had not a mere residence of a temporary nature, but one of a permanent and fixed character.

"Inhabitant" and "resident," and "inhabitancy" and "residence," are commonly used as synonymous. *Lee vs. City of Boston*, 2 Gray, 490.

In deciding the question of residence the intention of the parties is material. Story Conflict of Laws, 42; *In re James Casy*, 1 Ashmead, 126.

This intention may be known tacitly, or by express declarations. 2 Greenl., 412, citing, *arguendo*, Vattel, bk. 1, ch. 19, sec. 213.

A confession can never be received in evidence where the defendant has been influenced by any threat of harm. *Moore vs. Commonwealth*, 2 Leigh, 701; *State vs. Phelps*, 11 Vt., 116; *State vs. Grant*, 9 Shep., 171; *Ann vs. State*, 11 Humph., 159; *Stephen vs. State*, 11 Ga., 226; *Deathridge vs. State*, 1 Snead, 75.

Or where it has been extorted by pain, or made under the influence of fear. *Hector vs. State*, 2 Mo., 135; *United States vs. Mott*, 1 McLean, 499; *Serpentine vs. State*, 1 How. (Miss.), 256; 2 Russ. Crimes, 826, 831; *Berry vs. State*, 10 Ga., 511; 1 Whart. Am. Cr. Law, 685.

Or where any inducement has been held out tending to extort a confession either by intimidation or promise of favor. *Commonwealth vs. Chabcock*, 1 Miss., 144; *Commonwealth vs. Drake*, 15 Mass., 161; *Commonwealth vs. Knapp*, 9 Pick., 496; *State vs. Grant*, 92 Me., 171; *State*



*vs.* Jenkins, 2 Tyler, 377; *State vs.* Brick, 2 Harrington, 530; *Boyd vs.* State, 2 Humph., 39; *People vs.* Ward, 15 Wend., 231; *Oakley vs.* Shumaker, 15 Wend., 226; *Smith vs.* Commonwealth, 10 Gratt., 734.

Where a confession has once been obtained by means of hope or fear, confessions subsequently made are presumed to come from the same motive, and are inadmissible, though no such influences are shown. *State vs.* Roberts, 1 Dev., 259; *Commonwealth vs.* Harman, 4 Barr, 259; *Peter vs.* State, 4 S. & M., 31; *Deathridge vs.* State, 1 Sneed, 75; 2 Russ. Cr., 832; *State vs.* Guild, 5 Halst., 163; 1 Phillips Ev. (9th ed.), 410; Whart. Cr. Ev. (8th ed.), sec. 677; 1 Whart. Am. Cr. Law, 694.

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted in evidence. 2 Russ. Cr., 832, and cases cited; 4 Barr, 259.

In the absence of circumstances showing that the effects of the improper influence under which the first confession was made have not been totally removed, the influence of the motives proved to have been offered will be presumed to continue, and to have produced the subsequent confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected. 1 Greenl. Ev., sec. 257, citing Roberts' case; 1 Dev., 259, 264; *U. S. vs.* Charles, 2 Cranch, C. C., 76; *Joe vs.* State, 38 Ala., 422; *Hove vs.* State, 22 Ark., 336; *Rex vs.* Cooper, 5 C. & P., 535; *Commonwealth vs.* Harman, 4 Barr, 269; *Ward vs.* State, 50 Ala., 120; 2 Russ. Cr., 839.

The presumption is that the influence of the threats or promises continues, and such presumption must be overcome. *State vs.* Guild, 5 Halst., 163; *Commonwealth vs.* Knapp, 10 Pick., 477; *State vs.* Roberts, 1 Dev., 259; *Roscoe Cr. Ev.*, 48, n. 1; *State vs.* Broughton, 7 Ired., 96; *People vs.* McMahon, 1 Smith, 384; *Commonwealth vs.* Harman, 4 Barr, 269; *Whaly vs.* State, 11 Ga., 123; *Commonwealth vs.* Taylor, 5 Cush., 505; *Conley vs.* State, 12 Mo., 462; *State vs.* Nash, 12 La., 895; *State vs.* Fisher, 6

Jones (Law), N. C., 478; Simon *vs.* State, 36 Miss., 636; Roscoe Cr. Ev., 46, and notes.

A second confession made under the same influence as the first, when the first is inadmissible, is not receivable. Meynell's Case, 2 Lew., C. C., 122; Sherrington's Case, 2 Lew., C. C., 123; 2 Russ. Cr., 834; State *v.* Lowthorne, 66 N. C., 638; 20 Gratt., 724; Porter *vs.* State, 55 Ala., 95.

The burden rests upon the prosecution to prove that a subsequent confession was not made under influences which rendered the first inadmissible. Deathridge *vs.* State, 1 Sneed, 75; State *vs.* Roberts, 1 Devereaux, 259; 1 Whart. Am. Cr. Law, 694; State *vs.* Drake, 82 N. C., 592; 4 S. & M., 31; 2 Coldwell, 223; State *vs.* Jones, 54 Mo., 478.

A confession made in the afternoon after an inducement held out in the morning, held inadmissible. Meynell's Case, 2 Lew., C. C., 122; 2 Russ. Cr., 835.

Inducement held out on Monday evening, confession made on the following Wednesday without express caution, held inadmissible. Reg. *vs.* Hewitt, 1 C. & M., 534, approving Meynell's Case, *supra*; 2 Russ. Cr., 835.

A second confession made ten months after the first, which was improperly obtained, held inadmissible. State *vs.* Chambers, 39 Ia., 179.

The only direct evidence of the prisoner's guilt was furnished by these confessions, made under the suspicious circumstances which the record discloses.

A. S. WORTHINGTON for the United States:

The exception taken to the ruling that Juror Watson was a competent juror is based upon section 812, Rev. Stats. U. S.

"No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge."

The original law from which this section was carried into the Revised Statutes was enacted August 16, 1856. 11 Stat. at L., 50.

This, it will be noted, was long after the passage of the act of February 27, 1801 (now incorporated in section 93 of the Rev. Stats., D. C.), which provides that the laws of the United States not locally inapplicable shall have the same force and effect in the District as elsewhere in the United States.

In June, 1862, however, Congress passed an act entitled "An act providing for the selection of jurors to serve in the several courts in the District of Columbia." 12 Stat. at L., 428. This act supplied to the District a complete system of its own for the organization of juries. At that time we had a "circuit court" and a distinct "criminal court," and this law covered the selection and qualifications of jurors in both courts. The act provided, among other things, section 5, that "The names of the persons drawn shall not be again placed in such box for the period of two years."

This law is carried forward into the Revised Statutes of the District, secs. 851 to 875 inclusive, and the above-quoted provision becomes in the revision:

"Sec. 861. The names of persons drawn shall not again be placed in the jury box for the period of two years."

Thus the law stood until June 8, 1880, when Congress passed an act, among other purposes, to amend the above section 861—21 Stat., 166; Rich. Supp., 538—and which provides:

"That section 861 of chapter 24 of the Revised Statutes of the District of Columbia be and the same is hereby amended so as to read as follows:

"Sec. 861. It shall be good cause of principal challenge to any person called to serve as a talesman on a petit jury at any term of the criminal or circuit courts of the District of Columbia, that he has served as such juror in the trial of a cause in either of said courts at any time *within one year* next before his being so called and challenged."

Here, therefore, we have the case of a general statute applicable to all the "circuit and district courts of the United States," and a subsequent special statute addressed to this particular jurisdiction. There can be no question, it is submitted, that the latter governs.

Among the qualifications required to constitute a competent juror in the District is that of being "a resident of the District." Objection was taken to juror McDaniel that he is not such a resident. His statement in the bill of exceptions shows conclusively that he is a resident, unless the fact that he votes in Virginia necessarily establishes the fact that he is not a resident here. This question arises several times at the organization of every jury in this District, and has been so often and so invariably decided in favor of the competency of such persons that it cannot be considered an open question.

And so, conversely, under the attachment law, when the term "non-resident" is used, no lawyer would think of arguing here that McDaniels is a non-resident.

Exceptions 6 and 9 relate to the admission by the court of the testimony of officers Block and Raff as to the statements made to them respectively by the defendant at the *second* precinct station on the afternoon of the day after his arrest. The fifth exception was to the admission of the evidence as to what occurred earlier on the same day at the *first* precinct station, but that evidence was subsequently excluded by the court.

On this point the authorities appear to be practically in accord, and they are so numerous that it cannot be expected the court will examine them all. In Joy on Confessions, Law Library, vol. 40, the matter is fully discussed in sections III and IV, pages 34 to 44, and the conclusion is reached that confessions made in response to questions are admissible even when the question assumes the guilt of the prisoner. To the same effect see 1 Greenl. on Ev., sec. 229; Wharton's Cr. Ev., 647, 649, 662, 663, 664; 1 Bish. Cr. Pro., 1227, 1228; 1 Bennett & Heard's L. Cas., 198 to 203; Reg. vs. Baldry, 12 Eng. L. & Eq.,

590; Appleton on Ev., 185-8; Reg. *vs.* Jarvis, 10 Cox C. C., 574.

The Supreme Court of the United States has said that the rule excluding confessions has sometimes been carried too far, and that "in its application justice and common sense have too frequently been sacrificed at the shrine of mercy." Hopt *vs.* Utah, 110 U. S., 584.

The demeanor of an accused person when confronted by the silent witnesses to his guilt is always evidence. 1 Bish. Cr. Proc., 1242, 1246; 1 Gr. Ev., sec. 231, 232, 229; Wharton's Cr. Ev., 670.

Mr. Justice MERRICK delivered the opinion of the court.

Antonio Nardello was convicted in the criminal court of murder, and his case has been brought here on exceptions taken at the trial.

The first two exceptions were to the competency of jurors.

After the exhaustion of the peremptory challenges, the name of one Watson was drawn from the box; a specific objection was made to his competency by the counsel for the accused upon the ground that he had served as a juror within two years next preceding his call as talesman under that drawing. It was very earnestly argued by counsel for the traverser that section 812 of the Revised Statutes of the United States applied to this case. That section is in these words:

"No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause, that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge."

If that section of the Revised Statutes were applicable to the District of Columbia it would be apparent that Watson was not a qualified juror. But no one can read with a dispassionate mind this 812th section without seeing that it is exclusively applicable to the circuit and district courts of the United States within the States, and that it has no

application, and was never meant to have any application, to the District of Columbia.

A sufficient argument upon that subject is drawn from the collocation of the statutes themselves, for section 811 of the Revised Statutes, which immediately precedes this section 812, speaks with regard to certain functions in respect to the summoning of jurors in the circuit and district courts of the United States, in the courts of the Territories, and in the courts of the District of Columbia, enumerating specifically all four courts, and contradistinguishing the courts of the Territories and the courts of the District of Columbia, from the circuit and district courts of the United States. Then immediately follows this section 812, separated by a single period of punctuation, in which the declaration is that: "No person shall be summoned as a juror in any circuit or district court more than once in two years."

We have there within three lines, upon the face of the statutes themselves, the contrast made for the purposes of jury service between the circuit and district courts of the United States and the courts of the District of Columbia. That of itself would manifest that the purpose of the legislator was not to include the courts of the District of Columbia within the provisions of that section. But above and beyond that, and subsequent to the date of that section—of section 812—there was a specific jury law adopted for the District of Columbia, prescribing the qualifications, the terms of service, the mode of selection, and everything else appertaining to the sufficiency of jurors to be placed in a box for the trial of criminals, and that statute formed section 861 as it originally stood. The language of that section was then almost indetical in terms with section 812 of the General Statutes, in these words:

"The names of persons drawn shall not again be placed in the jury box for the period of two years."

But on June 8th, 1880, section 861 was amended, and in lieu of it was substituted this section:

"That section 861 of chapter 24 of the Revised Statutes

of the District of Columbia shall be, and the same is hereby, amended to read as follows:

“Sec. 861. It shall be good cause of principal challenge to any person called to serve as a talesman on a petit jury at any term of the criminal or circuit court of the District of Columbia, that he has served as such juror in a trial of a cause in either of said courts at any time within one year next before his being so called or challenged.”

That is the law and the only law applicable to a case of this sort now in force in the District of Columbia; and as the man Watson had not served within one year (so that he did not come within the prohibition of the statute), and there being nothing else in the statute to disqualify him, the court has no difficulty in saying that he was a perfectly competent juror according to the provisions of the law applicable to the administration of criminal justice within this District.

The next objection was made to the competency of a juror by the name of McDaniel, upon the ground that he was not a resident of the District of Columbia within the terms of the statute.

The facts in regard to him are to be found in his own statement, under oath, upon an interrogation by the court, on the challenge incorporated in the first bill of exceptions.

He stated “that his home was in Virginia; that his parents lived there, and that he returned there when out of employment elsewhere; that he votes there; that for the past fifteen years he has been spending his vacations, about two weeks in the summer in each year, at his home there; that during that period he resided in Washington, D. C.; during the balance of the year as the agent of the Virginia Midland Railroad Company, a Virginia corporation, in the employ of which corporation, as its agent in this city, he has been during said period of about fifteen years; that his only residence here is as an agent for said corporation; that he has never been married, and that he has no present intention of leaving the employ of said company and of returning to Virginia.”

That is to say, in briefer terms, he has been residing here continuously for fifteen years in the employment of a certain corporation, having his exclusive business and occupation as the agent of that corporation, with no intention of going away from the District of Columbia so long as he shall have employment; that he means to remain here indefinitely; that in point of fact, however, he does go home for about two weeks every summer, and that he does vote in the State of Virginia.

Now is he or is he not, in this state of case, a resident of the District of Columbia within the terms of the act of Congress prescribing who shall be jurors; the act of Congress saying that every citizen of the United States, who is a resident of the District of Columbia, is a competent juror within this District.

It has been, as I am advised, frequently adjudged in the several courts that such a person is a resident within the meaning of the statute. What constitutes a residence, as a matter of technical law, has never yet been defined. In other words, the term "resident" has not a technical meaning. In some statutes, and for some purposes, it means one thing; in other statutes, and for other purposes, it means another thing. For illustration, under the act of assembly, which is also in force here in this District, and which provides that a party, to make a bill of sale valid against his creditors where he remains in possession, shall have it acknowledged and recorded in the county where he resides, it has been adjudicated that a citizen of Virginia, who has personal property in the State of Maryland, and who happens to be within the State for a merely temporary and transient purpose, who has acknowledged and recorded a bill of sale of his personal property in the county where he thus temporarily is, is, for the purposes of the act of assembly, a resident of the county where he happens to be so as to give full legal integrity to his bill of sale.

But it has also been adjudicated there and in many of the other States that, for the purposes of the attachment law, a party is a resident who is within the reach of the



process of the court; and he is, on the other hand, a non-resident, although he claims his citizenship and his permanent home within the State, who has gone out of the State long enough to be beyond the reach of the attachment process. For the purposes of that law, sojourning out of the State for a time, though with the purpose of returning to his home, he is a non-resident. In regard to the law about voting a man must be a resident where he is to vote. The question arose in our neighboring State in a case that is particularly in point, so far as the present inquiry is concerned, the case of Mr. Gambrill, a native of the city of Annapolis, who had lived there all his life, who was appointed to a clerkship in one of the Departments at the city of Washington (the tenure of which is, as we all know, indefinitely held at the pleasure of the appointing power), and who came here and resided here as a clerk, meaning to reside here as long as that clerkship should continue. He was dropped from the registry list of voters in the State of Maryland and claimed to be restored to the registry list on the ground that he had not lost his residence in the State of Maryland.

The case was very fully argued before one of the ablest judges of the State (one of the judges of the Court of Appeals, Mr. Justice Miller), and after the fullest examination of the subject he decided that the party having come here, intending to reside here indefinitely, the mere claim that he would, at some future, indeterminate period, in a contingency which might or might not happen during his lifetime, return to his home, did not preserve his residence in the State of Maryland, and that he was a resident of the District of Columbia.

That case is on all fours with the present. This man resides here indefinitely; his only home, his only family altar, is his boarding house where his trunk is. If he were not a bachelor, but were a married man, it is quite manifest that the exigencies of his business and his occupation would require his family to be here with him, and then there would be no doubt in the mind of any man that he was, in

every sense of the term, a resident of the District of Columbia. The wife and children being with him, a casual visit of two weeks to the State of Virginia once a year would not make that a residence.

The fact that he is a bachelor does not give him any more residence in the State of Virginia, or deprive him of his residence here, than if he were a married man. After all you have to gather the purposes of the party, the intention of the party which constitutes his residence, from his general acts. This man designed, according to every external act, and according to his own declaration, to live here so long, peradventure for his entire life, as he should retain his employment. He had in fact lived here for fifteen years. All that he had he took under the laws and the political and civil organization of the District of Columbia, and in return did he not owe a corresponding duty to the community in which he got all that he had, and derived all the means of happiness that were in his power? It will not do to say that one shall have of a community all that he can get out of the community, and, on the other hand, shall not return to the community some corresponding obligation of citizenship. And especially does the rule apply to the District of Columbia, because the District of Columbia is part and parcel, in a large and legal sense, of every State. Each State has an interest in it. It is a contribution, so to speak, of all the States for the public good; and the party who comes here is a resident here, has a right to reside here, and there is no alienage as between this community and the community of his origin and his birth. Therefore when he comes to reside here, although it may be for an indefinite purpose, still so long as he is here he is identified with this community as much as anybody else is identified with it, and owes the same degree of duty, service and obligation to it as any other who may reside within its limits.

For these reasons in part, which are in complete analogy with the doctrines which have been held upon the subject of residence everywhere else, the court is of opinion that this

party was also a competent juror and that the exception must be overruled.

The third exception was to the admissibility of a declaration, made by the deceased when he was last seen, as to whither he was going. The murdered man, named Rotunno, when he left on the morning of July 28th, when he was last seen alive, left the companionship of two witnesses with the declaration, made in reply to an inquiry as to whither he was going, that he was going out to seek Nardello—to look for him. It was objected that the declaration being hearsay evidence was not competent testimony. The counsel for the traverser, although making the objection, did not argue it, and it is well that he did not, because if there be anything thoroughly settled in the law, it is that a declaration accompanying and explanatory of an act indefinite in itself, is always admissible as part of the *res gestæ*. Where a man goes forth and is asked where he is going and he states that he is going to a particular place, that statement is always admissible, and does not at all come within the rule against hearsay evidence. 1 Greenl. Ev., sec. 108. The exception is overruled.

Then there were objections made and exceptions taken to the confessions which were made by the prisoner to two officers, one a confession made about two o'clock in the afternoon of Sunday, and the other made at about three o'clock in the afternoon of the same day. The first one was made to officer Boteler, the second to officer Riley.

These confessions standing by themselves contain no element, or suggestion of any element, of a threat or inducement held out to the party which would invalidate a confession as not having the quality of perfect volition. But the argument was made that those confessions ought to be excluded because they connected themselves with an extorted confession made to officer Boteler at about two o'clock in the morning of that day at the police station after he was arrested. It seems that he was taken to the police station and was placed in irons and afterwards taken out of the cell where he had been first placed, and brought into the

other room and there, in the presence of five policemen, was interrogated by officer Boteler, which interrogation was preceded by the statement: "Now I want you to answer all questions put to you according to the truth." Thereupon he proceeded to make certain declarations.

Now, if this first so-called confession or declaration made under such circumstances had stood by itself, there might have been a question as to the propriety of admitting it, and the judge who heard the case, at first admitted it, but afterwards, upon the development of the surrounding circumstances, excluded it from the consideration of the jury. But he excluded it in conformity to the view which was expressed by the Supreme Court of the United States in the case of *Hopt v. Utah*, in 110th U. S., where, at page 587, the Supreme Court make the remark, that "a confession made to one in authority should not go to the jury unless it appears to the court to have been voluntary." While there was no sufficient inducement in words, either of threat or promise held out to the party sufficient to exclude that statement, yet the judge who sat at the trial, according to the spirit of the announcement by the Supreme Court, withheld it from the jury because of the circumstances of terror that surrounded the party at the time, ironed, in the presence of five officers, one of them demanding from him that he should tell the truth. In the view of the judge who tried the case these circumstances were sufficient to cause an apprehension on his part, springing from that tender solicitude which judges ordinarily have with regard to the confession which may be made by a criminal helpless and frightened, lest the confession might not be entirely free and voluntary, and it appeared to him that it was more prudent under the circumstances to exclude the confession, and he did so. But the same judge who excluded it admitted the subsequent confessions because they were not accompanied by any of the circumstances of terror which I have mentioned, and which seemed to characterize the first interview with the officers. There was abundant time in which possible or

imputed apprehension in the mind of the prisoner could have been dissipated, and the manner and the character of these interviews showed that the officers did nothing whatever to call forth the statements made by him in the interviews of two and three o'clock, because they were not only voluntary, but they were invited by the prisoner, so to speak.

At the first of these two interviews the officer went to the cell and asked him if he wanted anything to eat, speaking in the kindest and most conciliatory terms to him, thereby dispelling anything that might, in the remotest degree, have the semblance of any of the terror which applied in the mind of the judge to the early morning interview, and thereupon without any circumstance of intimidation at all, he made freely the statement which is given in the record.

And so with regard to the interview with officer Riley at three o'clock. The same circumstances of forbearance by the officer manifested and characterized everything connected with that statement, and there was an absence of any just ground for stating or believing that whatever influences might have existed in the first interview extended to and connected themselves with that.

The Supreme Court of the United States make some very valuable remarks upon this subject in the case to which I have adverted, of *Hopt vs. Utah*, page 583 of 110 U. S. Reports. They say:

"The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the court have wisely foreborne to mark with absolute precision the limits of admission and exclusion."

Now there is the guide, and the only rule appropriate to be laid down; that this whole matter is one to be left in a very large degree to the judgment and discretion, in

the absence, of course, of any specific threat and promise, of the judge who presides at the trial, who sees vividly before his mind the effect of things precisely as they are presented to the mind of the party making the confession, and precisely as they are presented to the jury, with all the influences brought to bear upon the credibility or non-credibility of the subject-matter detailed in the confession.

It is apparent to us that the judge, in the trial of the cause, had this rule in view; that he judged for himself and judged wisely; that there was nothing in the circumstances of these two later admissions made to Riley and Boteler, at the hours of 2 and 3 o'clock in the subsequent afternoon, which could rationally be supposed to connect them with and be controlled by the circumstances of terror arising out of the arraignment of a prisoner at the police station at 2 o'clock on the preceding night. And yielding our own minds under the instruction of this precept of the Supreme Court and the conduct of the judge in the trial, we are bound to say, and there is no difference of opinion or doubt entertained by any member of the court, that the prisoner had the benefit in the exclusion of the first statement of more, perhaps, than was necessary. But yet there is no criticism to be made upon the fact that it was excluded; it was just that it should be, because the mind of the judge below was more impressed, and properly impressed, than the mind of an appellate tribunal could be with regard to the circumstances surrounding the transaction and which could not be sufficiently photographed before an appellate court. But it is manifest that his indulgence in excluding the first confession or statement is a guarantee that the view which he took in respect to the confessions made at the second and third interviews fully comes up to the requirements laid down by the Supreme Court as a caution, and that full credence that is to be given by this tribunal in reviewing the action of the court to the discretion exercised, and which must be confided to the trial judge. He having (with the knowledge on our part of his exceeding forbearance in favor of the prisoner)

admitted these two confessions which, upon the face of them, have not the least similitude or remotest suggestion of any promise or threat made, and which were so far from the first interview as to have allowed full time for the repose of mind necessary to freedom of volition. We have no difficulty in saying that they were properly admitted.

Having thus reviewed all the exceptions taken, and there being no error apparent in any part of the record to the prejudice of the prisoner, the judgment of the court below is affirmed.

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CHARLES W. HELLEN *vs.* THE METROPOLITAN RAILROAD CO.

LAW. No. 23,690.

{ Decided November 23, 1885.

{ THE CHIEF JUSTICE and Justice MERRICK sitting.

A judgment founded in tort bears interest in the District of Columbia from the date of rendition.

Action in tort for injury to plaintiff by being run over by one of defendant's cars.

February 28, 1884. Judgment on verdict for \$1,500, with interest from date of rendition.

Defendants having objected to the allowance of interest upon the ground that judgments in tort do not bear interest in this District, the question was referred to the General Term to be heard in the first instance.

T. A. LAMBERT for plaintiff cited section 966 R. S. U. S. and sections 713 and 1007 R. S. D. C.; Fifth Baptist Church *vs.* Baltimore & Potomac R. R. Co., 2 Mackey, 458; Hetzel *vs.* Baltimore & Ohio R. R. Co., 3 Mackey, 495.

NATHANIEL WILSON for defendant.

By the COURT:

We do not doubt that judgments founded in tort, like those based on actions *ex contractu*, bear interest in this jurisdiction from the date of rendition. The objection is therefore overruled.

## SOPHIA MERCER ET AL. vs. WILLIAM HOGAN ET AL.

EQUITY. No. 6189.

{ Decided November 26, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. The Orphans' Court has full power, authority and jurisdiction to examine, hear and decree upon a credit claimed by an administrator in the settlement of his accounts for an individual claim of his against the deceased.
2. A decree or judgment of the Orphans' Court, in a *contested* matter, has the same force and effect as the decree of any other court in a contest *inter partes*. Where, therefore, exceptions to an administrator's account have been heard and determined in that court and no appeal is prosecuted, the account is *res judicata*, and cannot be reopened by the equity court on a bill filed by the same parties against the administrator for an account.

THE CASE is stated in the opinion.

HENRY WISE GARNETT and THOMAS J. MILLER for complainant.

ANDREW C. BRADLEY for defendant.

Mr. Justice COX delivered the opinion of the court.

The history leading to this litigation may be stated in a very few words. Wm. Hogan, sr., who was the father of the female complainants and of the defendant, was the owner of a tract of land situated in Australia. In 1856 he employed the defendant, his son, to go to that country, with powers of attorney authorizing him to manage the property and make sale of it. When he first went, his absence was intended to be only a temporary one, but it turned out that he remained a number of years in that country. He collected rents from property and made sales, and out of these moneys made sundry disbursements and remittances to his father. He rendered accounts from time to time, and finally the transactions were closed up in 1865 by the son's taking, himself as purchaser, the undisposed of balance of the land, at a price agreed on between the father and son; and then the son rendered a final account to the father embracing all the transactions from the beginning. He remained in that country several years after that, and did not



return until 1871. In December, 1871, and in January, 1872, he had settlements with his father of these unsettled accounts, which resulted in his father passing to the defendant his notes for the balance then supposed to be due, to the amount of \$8,315.41. In the middle of the year 1872, the father fell into a condition of helpless infirmity, but lingered on until 1874 when he died. The defendant then took out letters of administration upon his personal estate, and when he presented his first account for settlement in the Orphans' Court, he claimed a credit in that account for the amount of these notes, as a debt due to him from the deceased. Two of his sisters, Mrs. Gaines and Mrs. Mercer, appeared in court and filed exceptions to the account on behalf of themselves and the other distributees of the personal estate. It appears that Mrs. Kearney, a third sister, had authorized Mrs. Gaines to act for her in this proceeding also, and it is so testified in depositions taken in the Orphans' Court, and a letter from Mrs. Kearney to Mrs. Gaines to that effect is on file in the proceedings of that court.

The exception which relates to this particular item is, "they except to the credits claimed by the administrator in vouchers one and two, consisting of five notes amounting to \$8,315.41." They claim that the notes were obtained from the intestate at a time when, from infirmity of body and mind, he was incapable of doing business and that they were obtained without a legal consideration.

This exception, which is one of several to the admission of the account, raised the whole question of the balance due upon the account between the father and the son. Upon the application of the exceptants, the case was referred to Mr. J. J. Johnson to take testimony and report. Very voluminous depositions were taken, and he reported that the account was correct, that the father was capable of making this settlement, and, upon discussion in that court and a review of the whole proceeding, the court directed the account to be allowed and overruled the exception. An appeal was taken from that decision to this court and an order passed fixing the appeal bond at \$250, but no further step

was taken afterwards in that proceeding. The date of the order overruling the exception was October 30, 1877.

On May 26, 1878, the same parties who had excepted in the Orphans' Court filed their bill in this court, calling upon the defendant for an account of his agency in Australia, charging that he had not rendered a true account, that he was not entitled to credits claimed by him, &c., all of which opened up the precise question which was under discussion in the Orphans' Court and on which that court had pronounced a decision. The defendant at first demurred, and that being overruled, he then filed an answer in which he responded to the various allegations of the bill, and also set up as conclusive of this question, and as *res adjudicata*, the determination of it in the Orphans' Court. If his position in that respect be well taken, it blocks all further inquiry and it brings us at once to the consideration of the question how far the decision of the Orphans' Court is conclusive of a controversy in that court—a question of very great importance and one which does not seem to have been at all definitely settled.

We are forced, therefore, to examine into the statutes relating to the jurisdiction of that court. We find that the act of 1798, ch. 101, sub-ch. 15, section 12, provides that "The Orphans' Court shall have full power, authority and jurisdiction to examine, hear and decree upon all accounts, claims and demands existing between wards and their guardians, and between legatees or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may force obedience to and execution of their decrees in the same ample manner as the court of chancery may."

Now it must be admitted that this language is as comprehensive and as strong in conferring jurisdiction as any that ever was used in reference to any court. It is to have "full power, authority and jurisdiction to examine, hear and decree upon all accounts, claims and demands existing between wards and their guardians, and between legatees or distributees and executors and administrators."

What is a claim between executors and administrators on the one hand and distributees on the other? This term will include, first, the claims filed by distributees themselves to personal estate to be distributed among them, and claims by the executor or administrator on that estate, and, therefore, against the distributees. What is an account between the administrator or executor and distributees? It is an account in which the administrator charges himself with his receipts, and claims credit, first, for expenses of the estate, and, in the next place, for claims against the estate which he has paid, or which have been duly vouched and presented to him for payment. Now, in determining upon these questions of account between the administrator and distributees, the court is necessarily called upon to determine what claims the administrator is authorized to pay. It is true that our statute does not confer upon the Orphans' Court any power to adjudicate a controversy directly between a third person who is a creditor and an administrator. When a claim is presented, properly vouched, against the estate, the judge does indorse it, that "it will pass when paid." This simply means that the court will allow it as a credit in the administrator's accounts if he chooses to pay it; but a court has no power to decree that an administrator shall pay a third person a claim against the estate, nor that it shall not be ultimately paid. It has power, however, to determine whether the administrator will have credit in his accounts for the payment of a designated claim. But in this respect, under that statute, a claim which the administrator himself has against the estate is put on the same footing as all other claims.

There is, however, this distinction to be observed between a claim by an administrator against the estate as a creditor, and a claim by a third person. If the administrator chooses to dispute the claim of another creditor, it must be asserted in a court of common law or equity, but it is difficult to see exactly how the claim of an administrator on the personal estate can be determined otherwise than by presenting it

as a credit in his account. He cannot sue himself either at common law or equity. He cannot sue the distributees unless he is seeking to enforce his claim against real assets in their hands, as lands, &c. An action by an administrator against distributees to recover a claim out of the personal estate in his own possession, is something I never heard of.

So that it does not seem that there is any other way in which an administrator can have his own claim against an estate adjudicated, as between himself and distributees, than by presenting it as a credit in his accounts of administration. But whether that be so or not, it is very plain that he may present a claim in that way, and when it is so presented it is within the jurisdiction of the court to determine whether he shall have credit in the account for his individual claim.

I find there are three cases in which such claim, by an administrator or executor, was the subject of adjudication in which it was assumed as a matter of course, without dispute, that it was a proper subject for determination in the Orphans' Court in the settlement of administrator's accounts. One is the case of *Nicholls vs. Hodge*, in 2 Cranch, C. C., 582; another, *Stockett vs. Jones*, in 10 Gill & Johnson, 276; and another, *Cover vs. Stockdale*, 16 Maryland Reports, 10.

On this branch of the case then, we conclude that the court has full power, authority and jurisdiction to examine, hear and decree upon a credit claimed by an administrator in the settlement of his accounts for an individual claim of his against the deceased.

It will be further observed that the court is provided with the most ample apparatus for the most exhaustive examination and determination of questions of this kind falling within its scope and jurisdiction. Section 16 of the same act provides that: "Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation) and if the

party refuse to answer on oath (or affirmation as the case may require) to any matter alleged in the bill or petition and proper for the court to decide upon, the said party may be attached, fined and committed," &c. Sec. 17 of the same act provides: "And on such plenary proceeding all the depositions shall be taken in writing and recorded; and in case either party shall require, the court shall direct an issue, or issues, to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same; and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses; and the power of the court of law and the proceedings thereto relative, shall be, as hereinbefore directed, respecting the trial of issues; and the Orphans' Court shall give judgment or decree upon the bill and answer, or upon bill, answer, depositions or finding of the jury," &c. So, also, section 18 provides that "Any person who may conceive himself aggrieved by any judgment, decree, decision or order of the Orphans' Court, shall have the liberty of appealing to the Court of Chancery, or to the General Court of the shore wherein such Orphans' Court is held; if the judgment, decree, decision or order shall have been given or made on a summary proceeding, and on the testimony of witnesses, the party shall not be allowed to appeal, unless he or she shall immediately notify his intention, and request that the testimony may be reduced to writing; and in such case the depositions, at the cost of the party, in the first instance, shall be reduced to writing; and a transcript of the whole proceedings relating immediately to the matter shall be made out by the register of wills," &c., &c., "and transmitted to the said appellate court by the party within 30 days from the date of the decision or order, the said party shall otherwise lose the privilege of appeal; and if the decision of the Orphans' Court be in a summary way, and on papers filed in the court, no party shall be entitled to an appeal unless he or she enters the appeal within three days, and transmits a certified copy of

the proceedings as aforesaid within 30 days aforesaid; but in case there shall have been plenary proceeding as aforesaid, either party may prosecute the appeal by entering the same as aforesaid, and by transmitting a certified copy as aforesaid within 60 days from the date of the decree, judgment, decision or order," &c.

Now, it will be observed that in determining a controversy there are two modes of proceeding; first, a plenary proceeding, which is only another term for a formal proceeding in which the allegations of both parties are reduced to writing in the shape of a petition, and a sworn or affirmed answer, and depositions taken in writing, just as in a court of chancery. The other is a summary proceeding, which is simply where the court hear the allegations of the parties orally, and decide in a summary way, either upon written documents in the cause or upon the oral testimony of witnesses. It will be seen that either party has the right to convert the summary into a plenary proceeding upon demand, and then the proceedings are reduced to writing. Then a trial by jury is provided for, an appeal is provided for, and in respect to the privilege of an appeal, and in respect to the effect of the decision and the judgment of the court, it does not appear that there is the slightest difference between the plenary and the summary proceedings. The act implies, unavoidably, that the contest may be as well in a summary proceeding as in a plenary one, because it says, in reference to the right of appeal, that "any person who may conceive himself aggrieved by any judgment, decree, decision or order," &c., shall have liberty of appeal, and "if the judgment, decree, decision or order shall have been given or made *on a summary proceeding*," such and such measures shall be taken. Although it assumes that the contest *inter partes* is inaugurated and a decree authorized, whether the proceeding be a plenary or summary one.

Now, this was the law when the Orphans' Court constituted an entirely distinct forum from the appellate court when the old Circuit Court was in existence, and for a certain period after the creation of the present court. But since

that time, since the reorganization of this court, the Orphans' Court is to be considered as only a special term of this court. Appeals are provided for from that court to this in General Term, so that in all respects it stands on the same footing as the special term for equity business or the circuit court. The question naturally arises why should not a decree of the Orphans' Court, rendered in a contest, have the same effect as a decree of the court in special term held for equity business or a judgment of the circuit court. A doubt on this subject grows out of the peculiarity of proceedings in the Orphans' Court and certain decisions in Maryland in reference thereto. When an administrator files his administration account that is not the commencement of a contest. Ordinarily the court requires a notice to be published to all parties in interest that an account will be stated and distribution made on a certain day. It issues no process, and that notice is no process. Parties in interest may choose to ignore the whole proceeding and may not come in. If they do not come in the proceeding is entirely *ex parte*, and the Court of Appeals of Maryland has in repeated cases decided that in a court of equity or court of chancery, or in a common law court, when the proceedings of the Orphans' Court of an *ex parte* character are brought in question they are only *prima facie* evidence, and not conclusive of the matter contested.

But we have not been referred to any case; no case has been decided in Maryland, and no case, that I am aware of, in any other State, to the effect, that a decree or judgment of the Orphans' Court in a *contested matter* has not the same force and effect as the decree of any other court in a contest *inter partes*. All the decisions that have been brought to our attention and that we have been able to discover, are in the opposite direction. As far back as 1838, we find the case of *Lupton vs. Janney*, 5th Cranch Circuit Court Reports, 478, in which it appears that a bill in equity was filed to open an executor's accounts after they had been settled more than 12 years in the Orphans' Court, by the residuary legatees. That was a case

of *ex parte* settlement. But the court after considering this question thoroughly, after discussing the powers of the Orphans' Court said:

"This is a peculiar and exclusive original jurisdiction. An original bill in this court to compel executors to account with a residuary legatee not necessarily connected with any other ground of equitable jurisdiction, is a bill asking that which originally belongs exclusively to the Orphans' Court to do. It is a part of its ordinary duty to ascertain and distribute the surplus, or residuum of the estate, and for that purpose to settle the administration account. When that account necessarily and incidentally comes before this court, either as a court of equity or of law, in a suit of which this court has original jurisdiction, the *ex parte* settlement by the Orphans' Court would probably be taken to be *prima facie* correct, but the opposing party would have a right to surcharge and falsify, and the court would open it for that purpose; but if the settlement had been made by the Orphans' Court in a contested case between the same parties, it would probably be deemed by this court conclusive until it should be reversed upon appeal."

A similar question arose in the circuit court of the United States, before Justice Washington, then a member of the Supreme Court, in the case of *Blount vs. Darrach*, 4 Washington C. C. R., 659, which was the case of an effort to unsettle a guardian's account, which stands on the same footing as an administrator's account, by a bill in equity. Justice Washington there said: "The single question which arises upon the facts stated in the plea is, whether the account of the guardianship of James Darrach, which, by the decree of this court, was allowed and confirmed, is conclusive or not, so as to be a bar to the discovery and relief sought to be enforced by this bill. The general principles of law in respect to the conclusiveness of the judgments and decrees of the domestic tribunals of the country are well settled and perfectly intelligible. A judgment or decree of a court of competent jurisdiction, directly up-



on the point, is conclusive between the same parties, or their privies, upon the same matter, coming directly in question in another court of competent jurisdiction. The rule is founded upon consideration as well of abstract justice as of public policy, which forbids the litigation of any matter which has been once fairly determined by proper and competent authority between the same parties, or those standing in the relation of privies to them. If the matter or the parties be different, the former judgment, if admitted in evidence at all, as in particular cases it may be, can be so only as *prima facie* evidence, but not conclusive. And so extensive and universal is this principle, that it includes the judgments or determinations of tribunals having competent authority to decide, whether they be of record or not. Where the matter adjudicated is by a court of *peculiar and exclusive jurisdiction*, and the same matter comes incidentally before another court, the sentence of the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers."

Then he examines the statutory jurisdiction conferred on the Orphans' Court and says (p. 660), "upon a view of the above provisions respecting the Orphans' Court, I could not entertain a doubt were the question before me for judgment for the first time, that that court has jurisdiction to settle and to allow or confirm the accounts of guardians, and *finally* to decide upon the different items of those accounts, subject to the reversing and correcting jurisdiction of the Supreme Court."

Then he goes on to say that the same parties appeared in the case, and the decision of the Orphans' Court must be regarded as conclusive.

In 1867, the case of *Sparhawk vs. Buel*, occurred in 9th Vt., p. 41, in which this same question was considered. And so in *McKinney's Administrator vs. Davis*. This case arose under a statute which empowered the Orphans' Court to adjudge between a creditor and administrator. And the same principle is asserted in the case of *McDougal vs. Rutherford*,

in 30th Ala. Rep., 253. There is also the case of *Clarke vs. Callaghan*, 2 Watts, 259, and the case of *Bryant vs. Allen*, 6 N. H., 116, to the same effect.

So that all the authorities which have been brought to our attention and which I have been able to find myself, unite in conceding the same authority to the decree of an orphans' court or court of probate, *in a contested matter*, as they do that of any other court.

The question brought before us in the bill and answer in this case is the identical question brought before the Orphans' Court, on which a decree was rendered and from which decree an appeal was noted. In our judgment the only way to prosecute that investigation was to prosecute that appeal. That not having been done, the decree below has the same conclusive effect on this question as if the appeal had been taken, and the decree been affirmed here. That being our view of the operation of that statute and the effect of this decree, the defence is complete without going into the merits of the controversy between the parties as to the merits of the account. We are, therefore, of the opinion that the decree below must be affirmed.

UNITED STATES, USE OF ITSELF AND LUTHER H. PIKE,

vs.

ROBERT H. HUNTER.

LAW. No. 25,876.

{ Decided February 23, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. The object of a special traverse is to accompany the direct denial of plaintiff's averment with an explanation of the ground on which that denial is based.
2. An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in subordination to and recognition of their title, is not forbidden by §§ 2117 and 2118 of the Revised Statutes.

Appeal from a judgment on demurrer.

THE CASE is stated in the opinion.

LUTHER H. PIKE and J. J. JOHNSON for plaintiffs.

M. F. MORRIS for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This is a *qui tam* action to recover the penalties provided by the following sections of the Revised Statutes:

"SEC. 2116. No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars." \* \* \*

"SEC. 2117. Every person who drives or otherwise conveys any stock of horses, mules or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

"SEC. 2118. Every person who makes a settlement on any lands belonging, secured or granted by treaty with the

United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars." \* \* \*

Authority to bring an action in this form is provided by section 2124, as follows: "All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt in the name of the United States, \* \* \* the one half to the use of the informer, and the other half to the use of the United States."

The declaration alleges that these penalties have been incurred by acts of the defendant relating to lands owned by the Cherokees, and to lands held by the Cheyenne and Arrapahoe tribes. It contains four counts; two of them under section 2116, and two under section 2118. The first is for an alleged negotiation with the Cherokees; the second for an alleged negotiation with the Cheyennes and Arrapahoes; the third for an alleged settlement and marking of boundaries on lands of the Cherokees, and the fourth for an alleged settlement and marking of boundaries on lands of the Cheyennes and Arrapahoes.

The cause stands for trial on the pleas to the first and second counts, and these issues are not before us. To the third and fourth counts, which allege a settlement and marking of boundaries on lands of the Cherokees and of the Cheyennes and Arrapahoes respectively, the pleas interposed were, first, the general issue; second, a special traverse that the defendant had entered upon and occupied the lands in question for grazing purposes only, under a license or lease from the Indians, and that *without this* he had not made any settlement, or surveyed or attempted to survey or designate any boundaries on these lands. On the general issue there was a joinder, and to the special traverse a demurrer. The latter was overruled in the circuit court, and from this order the present appeal is taken. The only question before us then is, whether the case stated affirmatively in the special traverse, constitutes the unlawful act charged in the declaration, for which a penalty is provided by section 2118.

At the argument of the demurrer counsel for plaintiff insisted that, consistently with the plea, it might still be true that the defendant had surveyed and marked boundaries on these lands, and that plaintiff's allegation to that effect—constituting, as he claimed, a distinct offence under the statute—was therefore admitted by the plea. This objection ignores the character of the plea. The object of a special traverse is to accompany the direct denial of plaintiff's averment with an explanation of the ground on which that denial is based. This explanation takes the form of an affirmative statement of what the defendant had actually done, and it is put forward as a disproof and defeat of the plaintiff's alleged case. Stated in technical language, the defendant may be understood to say: "What I actually did was as follows, and this is not equivalent to the act which plaintiff avers; therefore I wholly deny his averment." In this way he presents separately a question of law, whether the case stated by himself, which he offers to prove, is equivalent to the case stated against him, or, on the contrary, disproves the latter and justifies a denial of it. In the plea before us the defendant directly and fully denies that he made any settlement, or surveyed or marked boundaries as alleged. But in his "inducement" he explains that he so denies because he had simply occupied these lands for grazing purposes only, and this under a lease or license from the Indians. There is no room, therefore, for the criticism that such a plea is consistent with his having surveyed and marked boundaries, and consequently admits the allegation that he had done so. The only question raised by the demurrer, then, is whether the case stated affirmatively by the defendant still amounts to the case stated in the declaration, and subjects the defendant to the penalties of the statute. This brings us to a consideration of the meaning of the statute.

Section 2117 forbids any person to drive cattle into these lands to range and feed, unless with the consent of the Indians by whom they are held; but it clearly permits them to do so with such consent. So far as this section is con-

cerned, any person may make any arrangement with the Indians which is limited to that particular use of their lands, and such an arrangement may define the extent of land to be so used and the time for which it shall be used, and it may provide for an exclusive use for such purpose during that time. In other words, section 2117 does not forbid, but permits, an *occupation* of Indian lands, with the consent of the Indians, to the extent of using them for grazing purposes only; that is to say, such occupation is lawful, for aught that is contained in that section, and is not subject to the penalty. Does it fall within the scope and intent of the next section, which forbids *settlement* on the lands of the Indians, whether with or without their consent? We think that, when these two sections are considered together, it is clear that the "settlement" referred to is an act which involves appropriation of the land, in exclusion of any title or right of the Indians, and that the survey and marking of boundaries mentioned are acts having reference to the same end. A license or lease for grazing purposes only, that is for a limited use, subordinate to the title of the Indians and recognizing that title, involves none of the pretensions which section 2118 is intended to suppress. It does not in any way involve dispossession of the Indians, nor contemplate such dispossession. We are of opinion, therefore, that the case stated in the affirmative part of this plea sustains the direct denial with which the plea concludes. The demurrer is consequently overruled, and the cause is remanded for further proceedings.

UNITED STATES, EX REL. JOSEPH A. SMITH,

vs.

WILLIAM C. WHITNEY ET AL.

EQUITY. No. 9361.

{ Decided September 25, 1885.

{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

This court has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court martial.

## STATEMENT OF THE CASE.

The relator having been, by the Hon. William C. Whitney, Secretary of the Navy, ordered under arrest and to appear before a court martial for trial on certain charges and specifications, applied to this court for a writ of prohibition to arrest the proceedings of the court martial, on the ground of want of jurisdiction in that tribunal to try and determine the matters and things charged against him.

HUNTON and CHANDLER for relator.

W. A. MAURY for respondents.

Mr. Chief Justice CARTER delivered the opinion of the court.

The court is of the opinion that it ought not to intervene in this case. In coming to this conclusion we have not entered into the merits or demerits of the case. The relator petitions this court to stretch forth its restraining power to prevent a naval court martial from discharging what they esteem to be their duty. The reason assigned for this request is that that duty, or whatever it is to be called, is in excess of its jurisdiction under the law and the Constitution. Now it may be true, as argued by his counsel, that the relator has committed no offence against military propriety or authority. Whether he has or not is not the question that we are called upon to decide. The question is whether we have the power to intervene and arrest the deliberations of this naval court martial. The Supreme Court of the United States, in the case of *Wales vs. Whitney*, 114 U. S.,

570, which was a case in strict analogy to the case at bar, has said, in terms as explicit as the English language permits, that neither they nor we have any such jurisdiction. That while this court can deal with the *consequences* of a usurped jurisdiction on the part of a military tribunal, and enlarge a prisoner suffering from its extra-jurisdictional power, yet we are limited to dealing with the consequences of its action and not with the process by which the consequence is produced. This is predicated of the fact that the action of that tribunal is a usurpation of authority.

It is true, as was ingeniously argued by counsel, that although this doctrine was announced by the Supreme Court in that case, yet it was not the central subject of issue before the Supreme Court or before this court from which the appeal was taken; that the real question was whether a man was imprisoned or restrained of his liberty, not what the correlative relations of the courts were. There is a good deal of force in that argument. But still the expression of the Supreme Court, even though it may border upon *dictum*, is so elaborated in the opinion in the case that it comes to us with advisory force, and with some of us at least on this bench reinforced by a reason lying behind it. In the case referred to, the Supreme Court say: "But neither the Supreme Court of the District nor this court has any appellate jurisdiction over a naval court martial nor over offences which such court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of a court only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere."

[It is confessed that there is none here.]

"Its power then extends no further than to relieve the prisoner. It cannot remit a fine, or return to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceed-



ings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction." *Wales vs. Whitney*, 114 U. S., 570.

There the Supreme Court establishes the doctrine, if what I have quoted is to be regarded as judicial, that the correlation of these courts is such that we may not interfere, and even as *dictum* it has very good reason behind it. The English cases cited by counsel do not conflict with it, for there the tribunal appealed to had supervision of all the courts in England; it was the court of last resort, and every other court was esteemed inferior to it in dignity and authority. It is otherwise here, we have no jurisdiction over these naval tribunals, although we have jurisdiction over the consequences that they entail. They do not sit for this jurisdiction; they are not in the roll of judicial bodies for this jurisdiction; they sit for the United States wherever the Secretary of the Navy ordains.

We feel that, under all the circumstances, we ought to dismiss this relation, and it is so ordered.

HENRY K. WILLARD, Administrator,  
vs.

MARY L. C. WOOD, Executrix.

LAW. No. 25,866.

{ Decided March 29, 1886.

{ The CHIEF JUSTICE and Justices COX and MERRICK sitting.

1. When the question is by which of several systems or laws contract rights are to be determined, the rule is that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the *lex fori*, but whatever goes to the substance of the obligation and affects the rights of the parties as growing out of the contract itself or inhering in it or attaching to it, is governed by the *lex loci contractus*.
2. A mortgage was executed in New York; the mortgage debt was presumed to be payable there since no other place of payment was designated.
3. As by the law of New York an assignee of an equity of redemption by a deed which he accepts, containing a covenant on his part to assume and pay the mortgage debt, but which deed is not sealed nor signed by him, nor intended so to be, is liable to suit for the debt by the mortgagee, he must likewise be held liable here; but the questions as to the form of the action, the time within which it must be brought, as well as the dignity or grade of the contract, *i. e.*, whether a specialty or in parol, must be decided by the law of this forum.
4. At common law, and it is so in this District, the acceptance of such a deed creates no specialty obligation on the part of the grantee, although he may be held liable on it in assumpsit as on a simple contract.
5. When the administrator of the mortgagee in such a deed brings suit upon it in this District to recover from the grantee's executrix a portion of the mortgage debt remaining unpaid after the foreclosure of the mortgage, the action must be in assumpsit, and the Statute of Limitations in force here is a bar if the suit be brought more than three years after the cause of action accrued.

Hearing in General Term in the first instance on an agreed statement of facts.

THE CASE is stated in the opinion.

ENOCH TOTTEN for plaintiff:

1. This is a New York contract and must be governed and construed according to the laws of New York. The parties all resided in New York, the contract was made there, the mortgaged property was situated there, the contract was to be performed and the money was payable there. *McGoon vs. Scales*, 9 Wall., 27; *Orvis vs. Powell*, 98 U. S., 176; *Brine vs. Ins. Co.*, 96 U. S., 627; *Norton vs.*

Pritchard, 106 U. S., 129; Gebhart *vs.* R. R. Co., 109 U. S., 527; Dennick *vs.* R. R. Co., 103 U. S., 11.

2. By the law of the State of New York, a purchaser of mortgaged real estate who accepts a deed thereto, containing a covenant that he assumes and covenants, and agrees to pay the mortgage as a part of the purchase money, is liable for the amount of the incumbrance, and his liability is precisely the same, whether he actually signs the deed or not. He is bound by the covenants in the instrument in either case, and an action at law may be maintained on the contract by the mortgagee. Trotter *vs.* Hughes, 12 N. Y., 74; Burr *vs.* Beers, 24 N. Y., 178; Thorp *vs.* Keokuk Co., 48 N. Y., 257; Hand *vs.* Kennedy, 83 N. Y., 149; Atlantic Dock Co. *vs.* Leavitt, 54 N. Y., 35; Vrooman *vs.* Turner, 69 N. Y., 280; Bowen *vs.* Beck, 94 N. Y., 86.

3. When a contract has been concluded between two persons for a good consideration for the benefit of a third, that third person may maintain an action on the contract against the obligee according to the common law, as well as in New York. Whorewood *vs.* Shaw, Yelv., 25 (1603); Dutton *vs.* Pool, 1 Ventrie, 318 (1673); 2 Lord Raymond, 928; Cowper, 443; 1 Bos. & Pul., 101, note c; 2 Dow. & Ry., 277; Schemerhorn *vs.* Vanderheyden, 1 John., 140; Cumberland *vs.* Codrington, 3 John. Ch., 255; Trotter *vs.* Hughes, 12 N. Y., 74; Lawrence *vs.* Fox, 20 N. Y., 268; Burr *vs.* Beers, 24 N. Y., 178; Griswold *vs.* Selleck, Minn. Sup. Ct., March, 1883; Hendrick *vs.* Lindsey, 98 U. S., 143; Nat'l Bank *vs.* Grand Lodge, 98 U. S., 123; Opdyke *vs.* R. R. Co., 3 Dill., 55; Hinkley *vs.* Fowle, 15 Me., 285.

(See an able article, by Henry O. Taylor, Esq., on this subject, in the Am. Law Review of April, 1881, vol. 5, N. S., p. 232.)

4. It is the general rule in the other States, also, that a purchaser of mortgaged real estate who accepts and enters into possession under a deed containing such a covenant, as is found in this case, becomes personally liable for the debt and on default may be sued. In most States the action may be maintained by the mortgagee, but this is

not allowed in others, and it seems that a technical distinction is made in a few States (mostly of the original 13) between sealed and unsealed instruments, and some courts hold that the action must be *assumpsit*, and not *covenant*. Jones on Mortgages, secs. 752 to 769; Huyler *vs.* Atwood, 26 N. J. Eq., 504; Hall *vs.* Marston, 17 Mass., 575; Allen *vs.* Stenger, 74 Ill., 119; Barnes *vs.* Johnston, 84 Ill., 95; Bristow *vs.* Lane, 21 Ill., 194; Walden *vs.* Karr, 88 Ill., 49; Brown *vs.* Strait, 19 Ill., 89; Lamb *vs.* Tucker, 42 Ia., 118; Arnold *vs.* Lyman, 17 Mass., 400; Joslyn *vs.* Car Spring Co., 7 Vroom, 146; Brewer *vs.* Dyer, 7 Cush., 337; Carnegie *vs.* Morrison, 2 Metcalfe, 381; Urquhart *vs.* Brayton, 12 R. I., 169; Bohanon *vs.* Pope, 42 Maine, 93; Thompson *vs.* Bertram, 14 Iowa, 476; McDowell *vs.* Law, 35 Wis., 171; Bassett *vs.* Hughes, 43 Wis., 319; Huff's Appeal, 24 Pa. St., 200; Snell *vs.* Ives, 85 Ills., 280; Ross *vs.* Kenison, 38 Iowa, 306; Comstock *vs.* Hitt, 37 Ills., 542; Fitzgerald *vs.* Barker, 70 Mo., 529; Heim *vs.* Vogel, 69 Mo., 529; Merriman *vs.* Moore, 90 Pa. St., 78; Brewer *vs.* Maurer, 38 Ohio St., 543; Rogers *vs.* Herron, 92 Ills., 583; Dean *vs.* Walker, 107 Ills., 540; Flagg *vs.* Geltmacker, 98 Ills., 293; Locke *vs.* Horner, 131 Mass., 93; Furnam *vs.* Durgan, 119 Mass., 93; Osborn *vs.* Cabell, 77 Va., 462.

The Federal courts recognize this doctrine. Twitchell *vs.* Mears, 8 Biss., 211; (S. C.), 9 Myers' Fed. Dec., C. C., 5, § 723; Betts *vs.* Drew, Chic. Leg. News, Nov. 8, '79, Harlan, J.; Drury *vs.* Hayden, 111 U. S., 223; reversing S. C., 9 Myers' Fed. Dec., ch. 5, § 719.

Many of the cases hold that this liability of the grantor so assuming the incumbrance, exists whether or not his grantor is bound personally to pay the debt, as in Thorp *vs.* Keokuk Co., 48 N. Y., 253; Gurnsey *vs.* Rogers, 47 N. Y., 233; Bassett *vs.* Hughes, 43 Wis., 319.

In Illinois, Iowa, Michigan, Wisconsin and Minnesota, and probably in most of the United States, as in New York, this assuming purchaser becomes the principal debtor as between him and his vendor. Crawford *vs.* Edwards, 33 Mich., 354; Miller *vs.* Thompson, 34 Mich., 10; Dean *vs.*

Walker, 107 Ill., 540; Thompson *vs.* Bertram, 14 Ia., 476; Moses *vs.* Clark, &c., 12 Ia., 140; Jones on Mortgages, secs. 752 to 762.

II. 1. At the common law the grantee in the deed of the kind in question here, who accepted the deed and took possession under it, was bound by the covenants contained therein, precisely as if he had actually signed and sealed the deed and "covenant" was the proper form of action. 1 Saunders' Pld'gs & Ev., 476, [389]; 1 Chitty Pld'gs, 119; Brett *vs.* Cumberland, Croke's James, 398; Coke Lit., 231a; Hunt *vs.* Rodney, 1 Wash. C. C., 375; Finley *vs.* Simpson, 23 Gab., 311; Scott *vs.* Lunt, 7 Pet., 605; Rose *vs.* Poulton, 23 E. C. L., 191; Vernon *vs.* Jefferys, 2 Strange, 146; Burnett *vs.* Lynch, 5 B. & C., 599; 12 E. C. L., 327; Hutchinson *vs.* R. R. Co., 37 Wis., 582; Hubbard *vs.* Marshall, 50 Wis., 327; Patchin *vs.* Swift, 21 Vt., 293; Schack *vs.* Anthony, 1 Maule & S., 573; Hawkins *vs.* Sherman, 3 C. & P., 459; 14 E. C. L., 388.

In many States an action at law may be maintained on the covenant by the mortgagee. Urquhart *vs.* Brayton, 12 R. I., 169; Merriman *vs.* Moore, 90 Pa. St., 78; Townsend *vs.* Long, 77 Pa. St., 143; Justice *vs.* Toltman, 86 Pa. St., 147; Jones on Mortgages, § 762.

This is undoubtedly the established rule in New York, and hence the liability of the defendant is the same here as if his testator had in fact signed and sealed the deed. The deed, as has been seen, must be construed as it would be in New York. Trotter *vs.* Hughes, 12 N. Y., 74; Atlantic Dock Co. *vs.* Leavitt, 54 N. Y., 35; Bowen *vs.* Beck, 94 N. Y., 86; Thorp *vs.* Keokuk Co., 48 N. Y., 257.

2. It being established that the defendant's testator was bound by the covenants in this deed in the same manner as if he had signed it, it must follow that he is bound by the covenants in it until they shall be "above twelve years' standing," and that the plea of the defendant of the Statute of Limitations constitutes no defence.

Some of the courts of this country, wherein the strict common law rules as to pleading and forms of action are

still observed, have held that the action of covenant cannot be maintained, for the technical reason that the defendant did not actually seal the deed, and that "assumpsit" must be resorted to.

The Statute of Limitations in force here provides that:

"No bill, bond, judgment, recognizance, statute merchant or of the staple, or other specialty whatsoever \* \* \* shall be good and pleadable, or admitted in evidence against any person or persons of this province after the principal debtor and creditor have been both dead twelve years or the debt or thing in action above twelve years' standing." Act of Md., 1715, ch. 23, sec. 6.

By the code of procedure of New York, it is requisite that the complaint shall contain—

"A plain and concise statement of the facts constituting a cause of action without unnecessary repetition."

The 28th rule of this court is in the following words:

"The declaration shall state only the substantive facts necessary to constitute the cause of action without unnecessary verbiage, and with substantial certainty."

There is no substantial difference between these two prescribed rules, and it may be said that the forms of action are the same. If this cause were in a New York court, this declaration would answer in the place of the "complaint" of the code, and the "complaint" in one of the courts of that State, would stand here for a declaration.

It will be admitted by all those courts which recognize the liability of the assuming purchaser, and which, also, observe the strict rules as to pleading, and as to the forms of action, that an action of assumpsit may be maintained against the purchaser, on such a contract as this, by the mortgagee; they put it on the ground of an implied promise to pay the debt to the mortgagee, enforced by the fact that the money was retained out of the purchase money for that purpose, and that therefore the equitable action of *indebitatus assumpsit* for "money had and received," may be resorted to for the purpose of enforcing justice. Now, inasmuch as our rules practically ignore the forms of actions

and pleadings, and require the pleader to state his case without designating or labelling it "assumpsit," "case," "covenant," "trover" or "slander," the character of the debt or of the instrument creating it, alone, furnishes the food for the Statute of Limitations to feed on; the circumstances of the case, and not the forms of action nor the forms of the pleadings must be looked to, in reference to the plea of the Statute of "Limitations." According to our rule of pleading, it can make no difference what we may call the action; the only question is whether or not the estate of the defendant is liable on the covenants contained in the deed. If it is, then the rule says the declaration shall state "only the substantive facts necessary to constitute the cause of action." The form is as wholly immaterial under our rules as under the New York code.

WM. B. WEBB and JOHN SIDNEY WEBB for defendant:

1. To prevent the bar of the Statute of Limitations, the action is brought, not in "assumpsit," upon the implied promise to pay, raised by entry and possession of the premises by Wood, but on the covenant contained in the indenture made between Wood and Dixon.

Therefore, the action being "covenant," must conform to the technical rules of the common law; it must be founded upon a deed—profert is made of a deed, which, aside from its irregularities, shows that the plaintiff is not a party, nor is he in any way a representative of a party.

"It is an inflexible rule that if a deed be *inter partes*, that is, on the face of it expressly describe and denote who are parties to it (as between "A of the first part and B of the second part"), C, if not expressly named as a party, cannot sue thereon, although the contract purport to be made for his sole advantage, and contain an express covenant with him to perform an act for his benefit. \* \* \*

The right of action at law has therefore been wisely vested solely in the party having the strict legal title and interest, in exclusion of the mere equitable claim." Chitty on Pleading, 3, 4; 1 Saunders' Pleadings and Ev., 390; 1 Walford

on Parties, 11; Berkeley *vs.* Hardy, 21 E. C. L., 495; Metcalf *vs.* Rycroft, 6 M. & S., 75; Anderson *vs.* Martindale, 1 East, 495; Barford *vs.* Stuckley, 6 E. C. L., 497; Southampton *vs.* Brown, 13 E. C. L., 322.

And is further extended in England to agreements in writing. Pigott *vs.* Thompson, 3 Bos. & Pul., 147 and note.

And to bonds for another's benefit. Offley *vs.* Ward, 1 Lev., 235.

The exception was said to be in cases of near relationship of the third person to the promisee. Dutton *vs.* Poole, 2 Lev., 210.

But that exception does not apply here, and the case has been practically overruled. Tweddle *vs.* Atkinson, 101 E. C. L., 392; Peddie *vs.* Brown, 3 Jurist, N. S., 895, H. L., 1857.

In this country the States most closely following the common law have held, that on a promise under seal made by A to B for the benefit of C, C cannot sue. Mellen *vs.* Whipple, 1 Gray, 317; Millard *vs.* Baldwin, 3 Gray, 484; Saunders *vs.* Filley, 12 Pick., 554; Ross *vs.* Milne, 12 Leigh., 204; How *vs.* How, 1 N. H., 474.

The cases in equity serve to show that no such right exists at law. Klepworth *vs.* Dressler, 2 Beas. Eq., N. Y., 62; Bissell *vs.* Bugbee, 7 Reporter, 550 (1879); Crowell *vs.* Hospital, 12 C. E. Green, 650; Culver *vs.* Badger, 29 N. J. Eq., 78.

2. The right of the plaintiff to sue in this case is sometimes put on the ground of a so-called exception to the rule stated by Chitty, often expressed in these words: "A third person may sue on a contract made for his benefit."

1st. It will be seen from an examination of the cases, that they are exceptions only in appearance, for the action is not brought on an express promise by A to B, but on an implied promise by A to pay money to C.

The benefit of the third person must have been the principal object of the contracting parties—it is not sufficient that it may incidentally benefit him. Dutton *vs.* Pool, 1



Ventris, 318; Felton *vs.* Dickinson, 10 Mass., 287; Farley *vs.* Cleveland, 4 Cow., 432; Garnsey *vs.* Rogers, 47 N. Y., 233; Merrill *vs.* Green, 55 N. Y., 270; Vroom *vs.* Turner, 69 N. Y., 283; Simon *vs.* Brown, 68 N. Y., 361; Treat *vs.* Stanton, 14 Conn., 445; Meech *vs.* Ensign, 49 Conn., 191.

"The real inquiry is whether the promise and undertaking of Hendrick were intended to enure to the joint benefit of Lindsay and Mansfield so as to entitle them to bring an action." Hendrick *vs.* Lindsay, 93 U. S., 137.

As this cause of action accrued and the statute began to run against it March 14th, 1874, it has long since been barred. Meech *vs.* Ensign, 49 Conn., 191; Hendrick *vs.* Lindsay, 93 U. S., 143; Felton *vs.* Dickinson, 10 Mass., 287; Arnold *vs.* Lyman, 17 Mass.; Motley *vs.* Ins. Co., 29 Me., 337; Bohanon *vs.* Pope, 42 Me., 93; Pike *vs.* Brown, 7 Cush., 133.

Even this remedy is denied in England. Tweddle *vs.* Atkinson, 101 E. C. L., 392; Price *vs.* Easton, 24 E. C. L., 193.

See also, Peddie *vs.* Brown, 3 Jurist, N. S., 895; Crowell *vs.* Hospital, 12 C. E. Green, 650; Warren *vs.* Batchelder, 15 N. H., 129; Tuttle *vs.* Catlin, 1 D. Chipman, 366; Exchange Bank *vs.* Rice, 107 Mass., 39; Owings' Ex. *vs.* Owings, 9 Harr. & G., 484.

If the plaintiffs may recover the balance of the defendant, they have a security for their debt which they did not originally have, which they never contracted for and which the contracting parties did not intend that they should have, it in effect makes him the absolute guarantor of the debt. Meech *vs.* Ensign, 49 Conn., 191.

To hold that a binding promise from the fulfilment of which a third person will derive some benefit, necessarily gives such third person a right to sue thereon, notwithstanding the clearly expressed intention of the contracting parties to the contrary, would impose a restriction upon freedom in acquiring contract rights almost as great as would result from denying the right of the third person to sue under any circumstances. Am. Law Rev., vol. 2, N. S., 232.

No legal relation whatever is established between the mortgagee and the vendee by transactions between vendor and vendee to which the mortgagee is not a party. 18 Am. Law Reg., N. S., 337, 401.

As the cases giving the mortgagee a right to sue in equity serve to show most clearly that no such right exists at law, some few of them are given here. *Crowell vs. Hospital*, 12 C. E. Green, 650; *Culver vs. Badger*, 29 N. Y., Eq., 78; *Moore's Appeal*, 88 Penn. St., 450; *Samuel vs. Peyton*, 88 Penn. St., 465; *Pettee vs. Peppard*, 120 Mass., 522; *Pike vs. Brown*, 7 Cush., 133; *Brannan vs. Dowse*, 12 Cush., 228.

And the mortgagee for want of privity cannot sue such grantee. *Mellen vs. Whipple*, 1 Gray, 317; *Exchange Bank vs. Rice*, 107 Mass., 39; *Townsend vs. Ward*, 42 Conn., 250; *Higman vs. Steward*, 38 Mich., 667; *Booth v. Conn. Ins. Co.*, 43 Mich., 299; *Unger vs. Smith*, 44 Mich., 22.

3. If for the sake of argument we concede to the plaintiff a right of action, it still becomes a question as to what remedy he has in a court of law.

The remedy is sought to be enforced here by an action of "covenant," and the sole question for the court is, can the plaintiff sustain "covenant" upon an instrument which is not signed nor sealed by the party sought to be charged.

First. Whatever may be the laws of New York in regard to the rights of the mortgagee against this defendant, it is settled by all the authorities that the *lex fori* determines the form of the action, that is, whether it shall be *assumpsit*, *covenant* or *debt*. *Pritchard vs. Norton*, 106 U. S., 133; *Bank vs. Donally*, 8 Pet., 371; *Andrews vs. Herriott*, 4 Cow., 508 and note.

To same effect: *Leroy vs. Beard*, 8 How., C. C., 451; *Douglas vs. Oldham*, 6 N. H., 160; *Trasher vs. Everhart* 3 Gill & Johns., 234.

Second. The authorities are abundant, that though the grantee enter into possession, yet he does not execute the deed, he must be sued on his parol contract, and not upon the covenants contained in the deed. 1 Chitty Pl., 104 and note 1, 118, 119; 3 Rob. Pract., 362, 363, 393, 438; *Stabler vs.*

Cowman, 7 Gill & John., 286; West. Md. R. R. Co. *vs.* dorff, 37 Md., 334-335; Hensdale *vs.* Humphrey, 15 431; Foster *vs.* Atwater, 42 Conn., 244; Johns Muzzy, 45 Vt., 420; Maule *vs.* Weaver, 7 Pa. St. Taylor *vs.* Glaser, 2 Serg. & R., 502; Trustees of Ho County *vs.* Spencer, 7 Ohio Rep., p. 2, 149; Davis *vs.* 6 Wis., 85; Bishop *vs.* Douglass, 25 Wis., 696; Go *vs.* Gilbert, 9 Mass., 513; Guild *vs.* Leonard, 18 Pick Nugent *vs.* Riley, 1 Met., 121; Pike *vs.* Brown, 7 133; Newell *vs.* Hill, 2 Met., 181; Parish *vs.* Whit Gray; Maine *vs.* Cumston, 98 Mass., 317; Martin v nan, 128 Mass., 515.

The Massachusetts cases are cited with approval i roll *vs.* Green, 2 Otto, 514.

Before the introduction of code pleading, this poi sustained by the courts of New York. Gale *vs.* Ni Cow., 445; Andrews *vs.* Herriot, 4 Cow., 508; Ler Beard, 8 How., 451; Broadhead *vs.* Noyes, 9 Mo., 56.

The law of England is, clearly, that covenant will 1 on an unsealed instrument. Brown *vs.* McFarran, 5 L. R., 223; Lock *vs.* Wright, 8 Mod., 40; Burnett *vs.* I 5 B. & C., 602; Walford on Parties, 18, 19; Platt on enants, 12; Abbott on Shipping, (8th ed.), 242.

The force and effect given to a seal in England i shown by the decisions that a covenantor who has se bound, in covenant, to his covenantee, although the nantee himself has not executed the instrument. M *vs.* Pike, 78 E. C. L., 473; Northampton Gas Lt. ( Parnell, 80 E. C. L., 630.

There is absolutely no ground for claim of the cou the plaintiff that our rules of practice have abandon distinctions in the forms of action and forms of plea

Whatever changes have been made, the fundan rules of the common law remain practically the same. distinctions between actions of covenant upon a seal strument and actions of assumpsit upon an implied pr are in full force to-day as in 1801.

Any form of action which the plaintiff may bri

barred by the statute 29 Car. II, ch. 8, § 4. The undertaking was not to be performed within the space of one year from the making thereof, nor was it signed by the party sought to be charged therewith.

If that portion of the contract, which is sought to be enforced, constitutes a substantial part of the contract, and comes within the statute, the action cannot be maintained. *Broodhead vs. Getman*, 2 Denio, 87; *Lockwood vs. Barnes*, 3 Hill, 128; *Bowie's Ex'r vs. Bowie*, 1 Md., 94.

The ground upon which, after part performance, the statute is held to be inapplicable in equity is, that it would be a fraud to defend under the statute. *Hamilton vs. Jones*, 3 Gill & J., 127; *Md. Sav. Inst. vs. Schroeder*, 8 Gill & J., 110; *Jones vs. Hardesty*, 10 Gill & J., 417; *Moale vs. Buchanan*, 11 *Id.*, 324.

As the statute says, "no action shall be brought," the question is one of remedy, and is governed by the *lex fori*, therefore it is immaterial to consider whether, assuming an action would lie in New York, the statute in that State must govern the present proceeding. *Leroux vs. Brown*, 74 E. C. L., 800; 1 Rob. Prac., 319, 320; *Story Conflict of Laws*, § 262; *Chitty Contr.*, 98.

Mr. Justice Cox delivered the opinion of the court.

This is an action by the administrator of a mortgagee against the estate of a person who purchased the equity of redemption and assumed the mortgage debt, to recover the balance of the debt remaining unsatisfied after a foreclosure sale.

There is an agreed statement of facts.

Those material to the present inquiry are as follows, viz.:

On the 7th of July, 1868, Martin Dixon executed a bond to Charles Christmas, in the State of New York, for \$14,000, to be paid on the 7th of July, 1873, with interest at seven per cent. per annum, payable semi-annually; and at the same time executed a mortgage to secure the debt on certain real estate in Brooklyn, N. Y. The bond came, by regular assignment, to the plaintiff. On the 19th of July,

1869, Martin Dixon and wife conveyed the mortgaged property in fee to William W. Wood, the defendant's intestate, by a deed, containing the following language, after the *habendum*, viz.: "Subject, however, to a certain indenture of mortgage made by said Martin Dixon to Charles Christmas to secure fourteen thousand dollars, dated July 7, 1868, and recorded, &c., \* \* \* which said mortgage, with the interest due and to grow due thereon, the party of the second part hereby assumes and covenants to pay, satisfy and discharge, the amount thereof forming a part of the consideration herein expressed, and having been deducted therefrom." The grantee neither sealed nor signed the deed, and the "*in testimonium*" clause shows that he was not expected to do so, as it recited that it was signed and sealed by the grantors only; but he accepted it and went into possession under it and made several payments on account of the principal, and paid the interest regularly down to March 14, 1874, when he sold and conveyed the property to one Bryan.

In 1877 the property was sold under a foreclosure proceeding, and the proceeds of sale credited on the bond, and the balance due, if plaintiff, on the facts stated, is entitled to recover, is agreed on.

This action was brought in December, 1884, and is, in form, an action of covenant on the agreement on the part of Wood, set out in the deed to him before mentioned.

The pleas are "never indebted," and "that the said cause of action did not accrue within three years before the commencement of the suit."

The case was heard here in the first instance.

The discussion of the case has assumed a wide range and embraced such questions as these: whether a man may sue at all on a promise to pay him money made to a third person; if so, whether he can sue unless the promise be made directly and designedly for his benefit, instead of being primarily for the benefit of the promisee; whether such action can be maintained by the intended beneficiary when the contract is under the seals of the parties to it; and if

so, in what form; whether the alleged agreement in this case is to be considered a specialty or simple contract, not having been signed or sealed by the defendant; and whether these questions are to be determined by the law of New York, where the contract was made, or by the law of this District where the remedy is sought.

Where a question arises by which, of several systems or laws, contract rights are to be determined, the rule is that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the law of the forum where the remedy is sought, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the place where the contract is made or is to be performed. See *Pritchard vs. Norton*, 106 U. S., 124.

In the present case the contract on which the action was founded was made in New York, and the money was payable there, as no other place was designated; and consequently the rights growing out of it are to be ascertained by a reference to the law of that State.

The first question is, whether an assignee of an equity of redemption, by a deed which contains a covenant on his part to assume and pay the mortgage debt, but which deed is not sealed or signed by him or intended so to be, is liable to suit for the debt in any form of action by the mortgagee.

There is no statute on this subject in New York, but the right of the mortgagee to maintain such action has been maintained in a series of decisions by the Court of Appeals of that State. See *Trotter vs. Hughes*, 12 N. Y., 74; *Burr vs. Beers*, 24 *Id.*, 78; *Thorp vs. Keokuk Co.*, 48 *Id.*, 257; *Hand vs. Kennedy*, 83 *Id.*, 149; *Atlantic Dock Co. vs. Leavitt*, 54 *Id.*, 35; *Vrooman vs. Turner*, 69 *Id.*, 280; *Bowen vs. Beck*, 94 *Id.*, 86.

This may be taken as the settled law of New York, and so far the case of the plaintiff may be sufficiently clear.

But the important question relates to his remedy.

It will be observed that the defendant never executed the deed containing the agreement on which he is sued, but simply accepted it as grantee; and the question is whether that act makes the deed his deed, so that he is to be sued in an action of debt or covenant as on a specialty; or, on the other hand, his obligation is merely a promise implied by law from the act of accepting the deed, on which only assumpsit can be maintained.

This indebtedness, if any, is more than three years, and less than twelve years, old. If it is a simple contract debt, the plea of limitations is a perfect defence. If it is a specialty debt, there is no defence.

The New York case last mentioned goes farther than to recognize a right of action in the mortgage, and, on a state of facts like those in the present case, holds that the deed is the deed of the grantee, though he did not sign it, and is not affected by the statute of limitations of New York applicable to simple contracts.

The case is exactly in point, in support of the plaintiff's case, if we are bound to accept the law of New York on this question as binding everywhere else. This depends upon the question whether the dignity or grade of a contract is determined by the *lex loci contractus* or by the *lex fori*. Is the question whether a particular contract is a specialty or a simple contract, one which relates to the construction of it, or the essential rights created by it, or one relating merely to the remedy? At first glance the former might seem to be the rule. But after all, the obligation of a contract, either to pay money or do a specific act, is just the same, whether it be under seal or not. The only differences made by the seal are in the form of the action on it, and the limit of time within which it must be brought. But these differences relate entirely to the question of remedy. It is admitted on all hands that the law of the forum must always determine what form of action must be adopted in a given case. And since the question whether assumpsit or covenant shall be brought depends on the dignity of the

contract, the determination of the latter seems involved in the former, and dependent on the same law.

Such seems to be the rule settled by the authorities.

Thus in *Bank U. S. vs. Donnelly*, 8 Pet., 361, it appeared that an action was brought in Virginia, in 1829, on a promissory note dated June 25, 1822, made and payable (in sixty days) in the State of Kentucky. The statute of Kentucky of 1812 provided—

“That all writings hereafter executed without a seal or seals, stipulating for the payment of money or property, or for the performance of any act, duty or duties shall be placed upon the same footing with sealed writings containing the like stipulations, *receiving the same consideration in all courts of justice*, and to all intents and purposes *having the same force and effect*, and upon which the same species of action may be founded *as if sealed*.”

The law of Kentucky was set out in the declaration with the obvious view of giving to the note sued on the character of a specialty contract.

The defendant pleaded the statute of limitations of Virginia, which enacted that—

“All actions of debt, grounded on any lending on contract, *without specialty*, shall be commenced and sued within five years next after the cause of such action or suit, and not after.”

If the note sued on was to be treated as a specialty in Virginia, because it was made so in Kentucky, this defence was insufficient; otherwise, if, notwithstanding the Kentucky statute, it was to be treated as a simple contract in the courts of Virginia.

The Supreme Court, after noticing that the Kentucky statute did not, in terms, declare the note to be a specialty but only gave it the force and effect of one, say:

“But whatever may be the legislation of a State as to the obligation or remedy, its acts can have no binding authority beyond its own territorial jurisdiction; whatever authority they have in other States depends on principles of international comity and a sense of justice. The gen-



eral principle adopted by civilized nations is, that the nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought. No one will pretend that because an action of covenant will lie in Kentucky on an unsealed contract made in that State, therefore a like action will lie in another State where covenant will only lie on an instrument under seal. \* The nature, validity and interpretation of the contract may be admitted to be the same in both States; but the mode by which the remedy is to be pursued, *and the time within which it is to be brought*, may essentially differ. The remedy in Virginia must be sought within the time, and in the mode, *and according to the descriptive character of the instrument* known to the laws of Virginia, and *not by the description and character of it prescribed in another State.*"

Now, if to be a specialty, as distinct from a simple contract, is a part of the meaning or of the essence of a contract to pay money, the law of Kentucky entered into this contract, and it was entitled everywhere to the same consideration, force and effect as a sealed instrument. But the Supreme Court has decided otherwise, and held that, although it had the force and effect of a specialty in Kentucky, it had not, therefore, the same in Virginia, but *its descriptive character*, in this respect, must be determined by the law of the latter State, and as by that law the note sued on was a simple contract, the defence of limitations appropriate to that character of cause of action must prevail.

A similar case is that of *Leroy vs. Beard*, 8 How., 451. It was an action of assumpsit, brought in the United States Circuit Court for New York, on a covenant of seisin contained in a deed of land executed in Wisconsin, to which only a scrawl or ink seal was attached, instead of a seal of wax or wafer which was required to make an instrument (a deed) in New York. The court below instructed the jury that the action of assumpsit was the proper form. And the Supreme Court say: "It becomes our duty to consider the

instruction \* \* \* as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the State of New York. \* \* \* We hold this, too, without impairing at all the principles that, in deciding on the obligation of the instrument as a contract, and not on the remedy on it elsewhere, the law of Wisconsin as the *lex loci contractus* must govern."

This is a clear decision that what was a specialty in Wisconsin was not, for that reason, a specialty in New York, and that the law of the latter State must determine the question.

This would be sufficient to settle the law on this question for us, but it may not be amiss to show that the rulings in the State courts are similar.

In *Trasher vs. Everhart*, 3 Gill & J., 234, it appeared that a suit in assumpsit was begun in the State of Maryland by attachment on a single bill, or promissory note under seal, executed in Virginia, which, by the laws of Virginia, was not a specialty, but a promissory note.

At the trial, the note was offered in evidence and was objected to as not proper to sustain assumpsit. Evidence as to the law of Virginia having been given, the court admitted the paper.

The Court of Appeals reversed the decision, saying: "The dispute is merely upon the remedy; that is to say, whether the action shall be covenant or assumpsit, upon a given contract between two persons within the jurisdiction of the court. The substance and effect of the recovery is the same in either form. \* \* \* The character of the instrument must be regulated by a reference to our domestic law."

Similar rulings will be found in *Andrews vs. Herriott*, 4 Cow., 508; *Douglas vs. Oldham*, 6 N. H., 160; *Brodhead vs. Noyes*, 9 Mo., 56. And we are not advised of any line of decisions to the contrary.

We are therefore forced to the conclusion that our own local law must determine the form of action in which this right of the mortgagee is to be asserted in this jurisdiction and whether it is barred by limitations.

At common law, while there was some controversy as to the right of a third person to sue on a parol promise made to another for his benefit, it was pretty clear that no such right existed as to promises under seal.

As Sheppard's Touchstone says, p. 174: "Any one that is party to the deed, to whom the covenant is made, may take advantage of the covenant, but not a stranger; for if A covenant with B to do an act to C, who is no party to the deed, and he doth it not, B, and not C, must sue him upon this breach."

The United States Supreme Court evidently takes this view in *Hendrick vs. Lindsay*, 93 U. S., 149, where they say: "It is argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain assumpsit on a promise, not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." And the court cite, for this position, 1 Parsons on Contracts (6th ed.) 467, where it is said: "But where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument; and a third party for whose benefit the promise is made cannot sue upon it."

We cannot but regard it as an innovation upon the common law, to hold that in case of a deed containing mutual covenants, regularly executed by both parties, a third person, a stranger to the instrument, may sue one of the parties on his covenants, though made for his benefit.

Still, it is no business of ours if the courts of New York choose to so modify the common law in reference to a New York contract, as to create rights which we would not recognise in a similar case arising within our own jurisdiction.

But we regard it as a still bolder innovation on the common law, to hold that the acceptance of a deed in fee-simple containing words of covenant on the part of the grantee,

but which is not and never was intended to be executed by him, makes it his deed, as if he had signed and sealed it, and creates a specialty obligation on his part.

We are not aware that any such result followed the acceptance of a deed at common law, except where a relation of tenure was created between the parties, and then only to a limited extent.

Co. Littleton, 231a, is referred to in support of the position taken in New York. The case was that where a lease was made to two on certain conditions, and the indenture bound them in a penalty to the performance of the conditions, and one only of the lessees sealed the lease, it was nevertheless held that an action for the penalty ought to be brought against both, and the plea in abatement of nonjoinder was sustained. In fact, Lord Coke was not discussing covenants, but commenting on Littleton's text in relation to estates in condition, in which (sec. 294) it was shown that whoever enters under a deed is bound by all the conditions in it, whether he executed it or not. The case put by him to illustrate this does go so far as to hold that a tenant bound by conditions is also bound by a penalty securing them, and was liable to action. What the form of action was does not appear. The liability to the penalty was put on the ground that he had agreed to the lease. The action must have been debt because there was no covenant, and that did not necessarily rest upon a specialty, but may have been founded on the assent to the conditions of the lease inferred from the act of entering under it.

The case is not a clear authority for treating the lease as the deed of the lessee, not executing it even as between landlord and tenant. But the limitations of the law on this subject are further shown in Sheppard's Touchstone, p. 176, in which Coke is cited. It is said :

"If a feoffment or lease be made to two, or to a man and his wife. and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, or the wife doth not, or doth not seal during the coverture, and he or she that doth not seal

doth, notwithstanding, accept of the lands conveyed, or demised; in these inherent covenants, as for payment of ricks thereof, clauses of distress or reparations and the like, they are nants as much as if they do seal the

And after giving one or two other

"But *quaere* of collateral covenants therein it seems the feoffee or lessee

In all the cases referred to by him of tenure accompanied with a reserva

But this is not authority for holding fee by which a grantor parts with his nant to pay a gross sum to a stranger collateral, becomes the covenant of not executed by him, so as to sustain covenant. Such a position seems to us law principles which are our only guide this character. The weight of authority that a deed, whether in form of indent only the deed of him who signs and to be the simple contract, at the same time without sealing, or, under some circumstances neither signs nor seals, but only accep

In *Stabler vs. Cowman*, 7 Gill & J., ment was clearly intended to be signed parties, but one omitted to seal through held that he could be sued in assumption was the deed of the other party.

The subject has been discussed at States where common law principles have from, and even in cases of leases it has same rule applies. Without citing from refer to *Henderson vs. Humphries*, 15 *vs. Muzzy*, 45 Vermont, 420; *Maule vs. Trustees vs. Spencer*, 7 Ohio, pt. 2, 149 128 Mass., 515. In one of these cases

of *Finley vs. Simpson*, 2 Zabriskie, 311, is spoken of as the only American case holding an opposite view.

For these reasons, even in States where a right of action by a mortgagee against the grantee of the equity of redemption, in cases like the present, is conceded, it is, nevertheless, held that the action must be *assumpsit*, as upon a promise implied from the acceptance of the deed containing the covenant to be performed by the grantee. *Locke vs. Horner*, 131 Mass., 93, and cases cited.

Our conclusion, then, is that if the mortgagee, under the rulings in New York, is entitled to claim the mortgage debt directly from the purchaser of the equity of redemption, in a case like the present, still he must assert his claim here in an action of *assumpsit*, and that our act of limitations is a bar to any action brought more than three years after the cause of action has accrued.

For these reasons judgment must be for the defendants.

CAROLINE MARKS ET AL. vs. WM

{ Decided April 12, 1886.  
} The CHIEF JUSTICE and Justices

EQUITY. No. 8276

Before a court of chancery will render its aid the plaintiff must have been in possession been threatened or assailed in some way, and it must have been vindicated by repeated acts have a cloud removed he must also have been must be with respect to something connected

THE CASE is stated in the opinion.

BIRNEY & BIRNEY for plaintiffs:

That there is no remedy whatever clouded title to unoccupied city Challen, 110 U. S., 25.

A bill to remove a cloud from title complainant is not in occupation. Blatch., 481; Gage vs. Griffin, 103 Ill Ins. Co., 52 Mo., 276; Hager vs. Shin

C. C. COLE and J. PARKER JORDAN 1

This is a bill in equity, *quia timet*, moving a cloud from the title of real complainants in the possession there

The original bill failed to allege amendment was allowed for that purpose ever, fails utterly to show that the complainant have been in possession of the property the proof is, that the defendant, WM session at the institution of the suit for the defendant Bell.

The bill was dismissed below on plaintiffs had a "plain, clear and adequate and that a court of equity had no submitted that the decree is right as Holland vs. Challen, 110 U. S., 19, Wall., 409; Orton vs. Smith, 18 How Even if the court should find the

upon the question of possession to be that neither party is in actual possession of the property, still the bill would not lie. Rev. Stats. U. S. for the Dist. of Col., sec. 809; *Sterns vs. Harmon*, decided in the Sup. Court of Appeals of Virginia, in January, 1885; Reporter, vol. 19, p. 476, April 15, 1885; *Harvey vs. Taylor*, 2 Wall., 328; *Banyer vs. Empie*, 5 Hill, 48.

The section of the Revised Statutes above referred to, provides that "all fictions in the pleadings in the action of ejectment within the District are abolished; and all actions for the recovery of real estate shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed thereof."

The code of Virginia has a similar provision in relation to the action of ejectment. In the case above cited in 2d Wallace, the Supreme Court of the United States, construing that statute, held that where neither party was in possession of the real estate, an action of ejectment could be maintained. And following that decision, the Court of Appeals of Virginia held, in the case of *Sterns vs. Harmon*, *supra*, that equity had no jurisdiction in a case where the facts were substantially the same as the case at bar.

Mr. Justice MERRICK delivered the opinion of the court.

This is a bill filed by Caroline Marks and others against Wm. H. Main and others. The complainants aver themselves to be heirs-at-law of one Henry A. Jackson, who, many years ago, purchased a certain lot in the city of Washington, and after having erected a house upon it, and leaving an agent to collect the rents, went away, and remaining absent for many years, died, leaving heirs-at-law.

The complainants claim that they are these heirs-at-law. The defendants on their part claim title to the property by virtue of certain conveyances from other parties, and these other parties, they allege, are the true heirs-at-law of the party who died seized of the property.

In the progress of events, after the death of Jackson, the property went to ruin, and the possession became, in point

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ute originated in the confusion of titles growing out of the land laws of the State of Virginia. It is matter of general history and judicial notoriety that the land laws of the State of Virginia were in the utmost confusion. Patents after patents were granted for the same tract of land, and the surveyors would, under a new patent, run over and overlap the lines of an old grant, so that there was inextricable confusion in the land titles of the State of Kentucky, and parties who were in possession were unable to make any improvements, or to know where they stood in respect of their titles.

There being, under such circumstances, no means of redress in a court of law, the legislature of Kentucky passed a statute in the year 1796 authorizing any party who was in possession of lands, having already title thereto, to convene into a court of chancery any party holding under a junior patent, or any other claim of title whatsoever, for the purpose of examining into and determining the question of title, and to remove the cloud upon the title of the complainant so that he might enjoy his possessions and improve them without hazard.

A suit under that statute to quiet the title was instituted in the United States Circuit Court for the district of Kentucky. The judges were divided in their opinion as to the jurisdiction in chancery of a Federal tribunal to administer that statute, and the cause was certified up to the Supreme Court of the United States, so that the question was broadly presented, first, whether, under the general chancery jurisdiction, there was any power to administer such relief; and secondly, whether it could be administered by force of that statute. And the Supreme Court, therefore, had directly before them, first, whether such power inhered in the jurisdiction of a court of chancery, and secondly, if it did not, whether a faculty to adjudicate such a matter arose by virtue of the statute.

The Supreme Court held that while it was not within the ordinary faculty of a court of chancery, under the jurisdiction which we had derived from the mother country, to

administer such relief, yet that it is not for any State, for the protection of its property of its citizens, to say what shall not be a cloud upon a title, and to enact, by way of law, that a court of chancery shall be created, and that it shall be to grant relief to the party who shall be entitled to it. It is not for the court of chancery to have the true title

The Supreme Court held, inasmuch as the jurisdiction in a court of chancery is inherent, that through a bill of peace, or a bill of review, it could lay a cloud upon a title, that wherever the exercise of that jurisdiction were modified, the jurisdiction being inherent, it was competent for the court of chancery to administer the relief. The creation of an entirely new jurisdiction, or the creation of an *entirely new jurisdiction*, in the court of chancery, unknown to the common law of England, could not have enlarged the chancery power, but the Federal court having inherent jurisdiction to relieve against clouds upon titles, it should please to say for the protection of titles, according to its own proper policy, that such a thing should be considered as a cloud upon a title, that the court of chancery should remove it, that the jurisdiction of a court of chancery to remove clouds upon titles is a statutory enactment and that statute is not unconstitutional, that it was competent so to grant relief.

But in this case they recognize the absence of any statutory power, the exercise of which a court of chancery should exercise if it did exist.

Then followed in order the case in Starrs, which was an appeal from the United States for the State of Oregon under the compulsion of State policy, by a similar statute. And in regard to the speaking for the Supreme Court, at p

"This is a suit in equity to quiet the title of the plaintiff to certain parcels of land situated in the city of Portland, in the State of Oregon. It is founded upon a statute of that State, which provides that 'any person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest.' This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose, unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor."

Here is a clear recognition that the general power of a court of chancery does not afford relief in quieting the title to real estate even where the party plaintiff is in possession, unless he has first vindicated his title and established it beyond peradventure, as against defendants, by successive actions at law. When that has been done the functions of what is called in chancery jurisdiction a bill of peace to quiet the title of a party in possession may be invoked.

Now, the statute of Oregon dispensed with the previous requirement of chancery jurisdiction to have the question of title adjudicated by the courts of law before the court would act. And in that case the Supreme Court maintained the jurisdiction, as in the former case, upon the ground that the predicaments for the exercise of the jurisdiction had been expanded by the statute, and having been expanded by the statute, the federal court could take cognizance of the subject, because the general subject of relieving clouds upon title was one which belonged to chancery jurisdiction and that was simply an expansion of the condition by removing certain conditions precedent to the exercise of jurisdiction, which removal did not confer a new or inherent jurisdiction in chancery previously non-existing. And upon that ground they maintained the jurisdic-

tion, but recognizing all the way through the doctrine of chancery, that in the absence of legislation not competent for a court of chancery so to do.

The next case is to be found in 101 U. S., 370, *Phelps vs. Harris*, where a similar statute had been passed by the State of Mississippi. And I read rather from that decision, because it lays down the doctrine of the Supreme Court of the United States as to the general chancery jurisdiction, and also quotes with approbation the doctrine as announced by the Supreme Court of the State of Mississippi as to the general chancery jurisdiction in the absence of statutory provisions. In that case they say:

"The bill was filed under a statute of Mississippi declared as follows: 'When any person, not the owner of any real estate in this State, shall have or other evidence of title thereto, or which may create or suspicion in the title of the real owner, such person may file a bill in the chancery court of the county in which the real estate is situated to have such deed or other evidence of title cancelled, and such cloud, doubt or removal from said title, whether such real estate is in possession, or be threatened to be disturbed in possession or not, &c.'"

Now, the Supreme Court go on to speak of the way:

"It is probable that the only effect of this statute is to enable owners of land not in possession to file a bill for the removal of clouds upon their title; since the ordinary jurisdiction of a court of chancery is sufficient to enable a person in possession to file such a bill."

In this case the statute had authorized those persons in possession to file a bill.

"The questions what constitute such a cloud upon title, and what character of title the complainant must have in order to authorize a court of equity to exercise jurisdiction of the case, are to be decided upon the principles which have long been established in those courts."

nent among these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it must not only be clearly invalid, or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held, that where the complainant himself has no title, or a doubtful title, he cannot have this relief."

"Those only," said Justice Grier, "who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

The court then refers to *Orton vs. Smith*, 18th Howard, 263, and other cases, and continues:

"And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

Then proceeding further, the court say:

"The Supreme Court of Mississippi, in their opinion in *Phelps vs. Harris*, 51 Miss., 789, a case between the present parties, say: 'This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law the trial of ejectments. He who comes into a court of equity to get rid of a legal title, which is allowed to cast a shadow on his own title, must show clearly the validity of his own title, and the invalidity of his opponent's. Nor will equity set aside the legal title on a doubtful state of case. The complainant, to enable him to maintain such a suit must be the real owner of the land, either in law or equity. Had the defendant, Mrs. Harris, derived her title to the property in controversy even from a doubtful exercise of power, that of itself would be sufficient to preclude the complainants from a resort to equity, upon the well-settled principles above laid down. \* \* \* We think,

therefore, that the court below was right in that the decree, &c.'"

Now, there the court reiterate the same doctrine and give validity to the jurisdiction by virtue of Mississippi dispensing with the previous title.

In the same manner the Supreme Court was called upon the question in 110 U. S., in the case of *Challen*, as brought before them by a statute of Nebraska. I read from page 18:

"The statute of Nebraska enlarges the class which relief was formerly afforded by a court of quieting the title to real property. It authorizes action of legal proceedings not merely in cases where peace would lie, that is to establish the title of a plaintiff against numerous parties insisting upon the title or to obtain repose against repeated litigation of a successful claim by the same party, but also to prevent litigation respecting the property, by removing causes of controversy as to its title, and so enable where a bill *quia timet* to remove a cloud upon the title would lie."

I read now from page 20:

"A bill *quia timet*, or to remove a cloud upon real estate, differed from a bill of peace in that it sought so much to put an end to vexatious litigation respecting the property as to prevent future litigation of existing causes of controversy as to its title brought in view of anticipated wrongs or mischief. The jurisdiction of the court was invoked because the plaintiff feared future injury to his rights and interests. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, where the defendants were numerous, that his title should have been established at law or be founded on long continued possession."

Then they go on to speak of the statute of Nebraska and they vindicate the right of the Supreme Court to

diction by virtue of the statute of Nebraska upon the same ground that had been first announced and maintained in the case of Clark against Smith, in 13 Peters, to which I have already adverted.

In the course of the opinion are certain other remarks at page 24, which are appropriate to be read:

"The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it, casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment is inherent in a court of equity. And though conditions to its exercise have, at different times, been prescribed by that court, both in England and in this country, they may at any time be changed or dispensed with by the legislature without impairing the general authority of the court."

Here we see the ground upon which the Supreme Court rest the power of the Federal courts to administer chancery relief in respect of those clouds of title that they formerly had not jurisdiction over, because having jurisdiction over the general subject of the cloud, the court may recognize, in the administration of its chancery jurisdiction, the power of the State legislature to remove certain conditions to the exercise of the jurisdiction. The court continue:

"The equitable rights of parties in Nebraska, claiming the legal title to real property, are simply enlarged by its statute, not changed in character. And the language used by this court, speaking by Mr. Justice Bradley in the Broderick Will Case, 21 Wall., 520, is appropriate here: 'Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the State.' And it may be affirmed of this case, what was said as probably true of that one, that it is 'a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding.' Indeed, as the court there observe, 'much of



If his title has been disputed, it must have been vindicated by repeated actions at law. So if he seeks to have a cloud removed he must also have been in possession, and the cloud must be with respect to something connected with his own title.

None of these conditions exist on the part of the complainants in this cause, and when you come to analyze the case you find it is the naked case of two parties, both of them being out of possession, and one claiming that a court of chancery shall determine between them as to who is and who is not the heir-at-law of the last decedent. They seek to turn a court of chancery into a court of law for the purpose of determining a disputed question of title. But they say they are remediless without the assistance of chancery, because, not being in possession, they cannot go into a court of law.

The answer to that is very manifest. Let them take some steps towards putting themselves in that predicament which the court of chancery requires before an appeal to its jurisdiction can be had. Let them go and take possession and enclose the property, or if the attempt to take possession be resisted by another, and that other take possession and oust them, then they have a plain remedy in an action of ejectment or trespass, whichever they may please to elect; and there, and in that mode, they can try the question of title. But they must not, for the purposes of convenience, come into the court of chancery without resorting to all the legal means that lie at their hand before they invoke the extraordinary power of this tribunal.

The result of a different decision would be that this court would be charged with a speculative inquiry with respect to all the vacant lots in the city of Washington (and we know that in regard to many of them there are disputed titles), and the court of chancery would be turned into a court for the purpose of determining and quieting questions of title, and we should have to examine questions of law and equity and should be crowded beyond the capacity of a

court of equity if there were such a jurisdiction these controversies.

It seems to us, therefore, in the light of these and in the light of the judicial and legislative country, and in the light of the numerous upon the subject, that there is nothing before this application, and the decree of the after, as I have said, three successive adjudications different stages of the case, should be affirmed or dismissed.

It was not necessary for the purposes of this we should consider the operation of the act modifying the action of ejectment, and not before we omit the expression of any opinion with respect to the operation of that statute is.

## ADOLPHUS ECKLOFF vs. THE DISTRICT OF COLUMBIA.

LAW. No. 24,748.

{ Decided April 19, 1886.  
{ The CHIEF JUSTICE and Justices JAMES and MERRICK sitting.

1. There are no absolute rules for determining the question of the implied repeal of a statute by a later statute. The question in every case is one of intention.
2. The act of Congress of June 11, 1878, establishing a system of government for the District of Columbia, is to be regarded as an organic act intended to dispose of the whole question of a government for this District.
3. A general power given to the possessors and executives of all the powers of government must be intended to be complete and comprehensive, and is not to be cut down by referring to antecedent statutes making special provisions for a part of that government.
4. The organic act of 1878 which gave to the Commissioners of the District of Columbia the general power of removal from office operated to repeal the provisions of the act of 1861, forbidding the removal from the police force of any person except upon written charges preferred against him.

THE CASE is stated in the opinion.

C. C. COLE and A. C. RICHARDS for plaintiff.

A. G. RIDDLE for the District.

Mr. Justice JAMES delivered the opinion of the court.

The plaintiff recovered judgment in the circuit court for five hundred dollars, for salary as lieutenant of Metropolitan Police, for the months of April, May, June, July and August, 1883, at one hundred dollars per month, and from that judgment the defendant has appealed.

It appears by the bill of exceptions that, on the 31st of March, 1883, the Commissioners of the District of Columbia made an order to dismiss the plaintiff from service on the police force without trial or hearing on charges against him, and that the judge who tried the cause ruled that "the plaintiff could not, under the law, be suspended or discharged from service on the police force of the District of Columbia without trial or written charges and an opportunity to be heard in his defence." Whether the power of the Commissioners to remove from office was absolute, or

was subject to this condition, is the question proper for our consideration. It is claimed on the part of the District that absolute power to remove officers of police force, equally with other officers under their control, is conferred upon the Commissioners by the act of August 6, 1878. The provisions of that act which relate to the subject are to be found in section 3 and section 6. Section 3 provides that the Commissioners are "authorized to consolidate any office, to consolidate two or more offices, to change the number of employees, remove from office, and to make appointments to any office under them authorized by this act." and section 6 provides that "from and after the first of July, eighteen hundred and seventy-eight, the Metropolitan Police and the Board of School Trustees shall be abolished, and all the powers and duties now exercised by them shall be transferred to the said Commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such regulations as may be necessary to carry into execution the duties devolved upon them by this act." In order to determine the effect of these two provisions we have to look to laws already existing at the time of the enactment of June 11, 1878, and to consider them together.

The act of August 6, 1861, by which the Metropolitan Police force was established, is to be found in the Statutes relating to the District of Columbia. The act of the revision provided for "a board of five commissioners of police. Section 337 provided that "the board is authorized to pass, from time to time, rules and regulations for the proper government and discipline of subordinate officers, and the duties of the police force to be executed in accordance therewith."

Section 341 provided that "the officers of the police shall be severally appointed by the board of commissioners, or such person, so appointed, shall hold office only for so long a time as he shall faithfully observe and execute the rules and regulations of the board, the laws of the United States, and the laws or ordinances existing within the District of Columbia."

and which apply to any part of the District where the members of that force may be on duty."

Section 342 provided that "the qualifications, enumeration and distribution of duties, mode of trial and removal from office of each officer of the police force, shall be particularly defined and prescribed by rules and regulations of the board of police, in accordance with the Constitution and laws of the United States applicable thereto."

Section 355 provided that "no person shall be removed from the police force except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defence; and no person removed from the police force for cause shall be reappointed to any office in said force."

It is claimed on the part of the District that the general and absolute power to "remove from office," which was afterwards conferred upon the Commissioners by the act of 1878, repealed by implication at least so much of section 355 of the Revised Statutes as forbade the removal of any person from the police force, except upon written charges preferred against him, and after an opportunity afforded him to be heard in his defence. On the part of the plaintiff it is claimed that the act of 1878, which gives the general power of removal from office, and the act of 1861 (the original of the sections quoted from the Revision), must both be made to operate, if possible, and that, when thus construed together, the later act means that the Commissioners shall have an absolute power to remove from office, without trial or hearing, all officers except those of the police force, and that, as to these, they shall have power to remove in the same manner as the Police Board (whose powers and duties are in terms transferred to them) had that power; namely, after a hearing upon written charges preferred.

It can hardly be said that there are any absolute *rules* for determining the question of implied repeal. The question in every case is, whether the intention of the later act, as ascertained by judicial construction upon all the grounds applicable to it, is to lay down a rule which puts aside the rule

provided by the earlier act; and it is not reason we conceive it to be the law, that the intent of is always to be narrowed down, so as, *if possible* the operation of the earlier act. In accordance view we think we are bound to consider the ture and object of this kind of legislation, & these two statutes present a case which stands plane with the statutes to which the doctrine co-operation has ordinarily been applied.

In order properly to determine the nature of 1878, we must recall the previous legislation for the establishment of a government for the District. By the act of February 21, 1871, Congress provided for a Governor, a Legislative Assembly with large powers, boards charged with independent powers; leaving in existence certain boards which already possessed independent powers. When this system was found to be inconveniently established, in 1874, Commissioners in whom were placed part of the powers theretofore distributed were appointed, still leaving in existence, however, the old School Board with its powers, and the Police Board with its separate powers. Finally, in 1878, Congress passed a law intended, to establish a complete system of government for the District, concentrating in three Commissioners such duties as had, until that time, been independent of any other board. This act, we conceive, is to be regarded as an act intended to dispose of the whole question of a government for this District, and the powers bestowed by the Commissioners are to be regarded as organic powers. In other words, we must address ourselves to the question of constructing it much as we should to the construction of a constitution. Powers are called constitutional powers. If this be the intent of this statute, a general power, given to the Commissioners, of all the powers of government for the District, must be intended to be complete and comprehensive, and is not to be cut down by referring to precedent statutes which had made special provisions for a part of the government of this District. When

ple, we find that the Commissioners are invested with power to *abolish* offices, to *consolidate* several offices, to reduce the number of employees, to *remove* from office, and to appoint to office, can we doubt that it was the intention of Congress to bestow what we have called an organic power over the subject of offices, especially when we find that this power includes legislative as well as executive functions? And can we doubt that, as organic power. These powers of abolition, consolidation, removal and appointment must be intended to replace former systems? We conceive that this is the true character of the complete organization provided by the act of 1878 for the government of this District, and that, when so regarded, it must be held to do away the impediments which pre-existing acts on special subjects would place in the way of the organic power over the whole subject of offices. We hold, therefore, that, by a necessary implication, that provision of the act of 1861 which, with a view to the government of the police, and not to personal privilege and exemption, forbade the removal of any person from that office except on conditions, was repealed by the organic act of 1878 which gave to the Commissioners the general power of of removal from office.

The judgment of the circuit court must therefore be reversed.

JAMES H. MARR, Administrator,

*vs.*

EDWARD KÜBEL.

LAW. No. 24,680.

{ Decided April 12, 1886.  
The CHIEF JUSTICE and Justices JAMES and

1. In an action of detinue no proof of a previous demand or serving of the summons being a sufficient demand.
2. The Statute of Limitations does not begin to run in favor of the defendant until he sets up an adverse claim in respect to the bailment.

STATEMENT OF THE CASE.

This was an action of detinue brought to recover bonds claimed to have been deposited with the defendant in August, 1879. The bill of exceptions sets out the material facts as follows:

"At the trial of this cause the plaintiff, to whom the bonds were issued on his part joined, proved the grant to him of administration on the estate of Erhardt Mack by the Supreme Court of the District of Columbia on the 24th day of April, A. D. 1883, and that he thereupon performed his duties as such administrator; and that said Mack, in the city and State of New York, died on the 1st day of April, A. D. 1881; and that among the assets of said estate came into the possession of plaintiff as administrator a paper writing executed by the defendant, and which was offered and read in evidence in the words and to the effect following, to wit:

"Received of Erhardt Mack six U. S. coupon bonds of the denomination of one thousand dollars each, to the order of 238,826, 4 per ct., for safe keeping, and to be returned to him on call.

"WASHINGTON, D. C., August 2, 1879.

"EDWARD KÜBEL

"326 First street, Washington, D. C.

"And the plaintiff further proved that the defendant was administrator in said city of New York, appointed on the 1st day of April, A. D. 1881, of said State of New York, administered in said



York upon the personal estate of said Mack; and that Richard M. Bremon, an attorney-at-law and counsellor, of said city of New York, representing said public administrator, together with William Pierce Bell, attorney for the plaintiff in this cause, called upon Martin F. Morris, the attorney for the defendant in this cause, at the city of Washington, in the District of Columbia, on the 26th day of December, A. D. 1882, and made demand upon him for the surrender of the bonds mentioned in the foregoing receipt; and that said Morris then and there offered that if said public administrator would file a bill in equity in said District to litigate the controversy, and not a suit at law, he would waive on behalf of the defendant the defence of the Statute of Limitations and all objection to the right of said public administrator to sue in the District of Columbia, said Morris at the time admitting that he was attorney for the defendant, and that demand on him was demand on Kubel; that the said public administrator did not file any bill in equity in said District, but that subsequently, after the appointment of the plaintiff in this cause as administrator of said Erhardt Mack in the District of Columbia, said plaintiff, on June 3, A. D. 1883, caused a bill in equity to be filed in said District in his own name as administrator, and a writ of subpœna in pursuance thereof was served upon the defendant in said equity cause No. 8,600, and introduced the record in evidence; but that subsequently, before issue joined thereon, the plaintiff caused the same to be discontinued.

The plaintiff then caused the present suit to be instituted, and the writ was duly served upon the defendant. And the plaintiff then further offered testimony to prove that the defendant had not redelivered or surrendered the bonds or paid anything on this account. And thereupon, this being all the testimony in the case on the part of the plaintiff, he rested.

The defendant offered, through his attorney, to be sworn as a witness on his own behalf, and to testify as to the circumstances under which the paper writing herein-

before mentioned was executed; but he was refused and not permitted to testify.

Thereupon the defendant requested the court to instruct the jury as follows:

"The defendant prays the court to instruct the jury, that if they find from the evidence that the bonds, for which this suit was brought, were delivered by the plaintiff's intestate to the defendant as a bailee without hire to be re-delivered upon demand, they were presently and immediately demandable, and the Statute of Limitations began to run from the time of the delivery of the bonds to the defendant."

[There were a number of other prayers, but as they were substantially the same in effect, it is not deemed necessary to insert them here.]

But the court severally refused to give each of said instructions, or any one of them, but said:

"I adhere to the impressions that I first took that the Statute of Limitations did not run in this case until a sufficient demand was made; and, therefore, under the evidence the plea of the Statute of Limitations does not prevent recovery in this case. With regard to the demand itself, I think a foreign administrator has a right to make the demand, and the defendant would have a right to be discharged upon paying the foreign administrator. That is a sufficient demand, and suit might afterwards be brought either by a foreign administrator or a local administrator. In this case it does not appear that demand was made by the foreign administrator upon the defendant. Mr. Morris does not admit that he was the representative of the party for such a demand, and what he said at that time would not be evidence in the case. It seems to me that the subsequent demand by the institution of the suit, taken with the interview with Mr. Morris contemplating such a suit was a good demand by the present administrator. Perhaps the suit alone would not be sufficient; but that suit, taken in connection with the interviews with Mr. Morris which terminated with their making a demand by legal proceed-

ings, does amount to a demand sufficient to entitle the plaintiff to have the bonds before the suit was brought. In other words, that legal demand was made before this suit was brought, and consequently a cause of action arose on the refusal to deliver.

"All the special prayers of defendant are refused, although they may be sound propositions of law. Most of them are mere variations of others; that the cause of action arose on the deposit of the bonds.

"With my view of the matter, I therefore instruct you that I think demand was sufficiently made in this case."

And thereupon the court further instructed the jury to render their verdict for the plaintiff. To all of which rulings of the court the defendant excepted.

WM. PIERCE BELL and WM. H. LARNER for plaintiff.

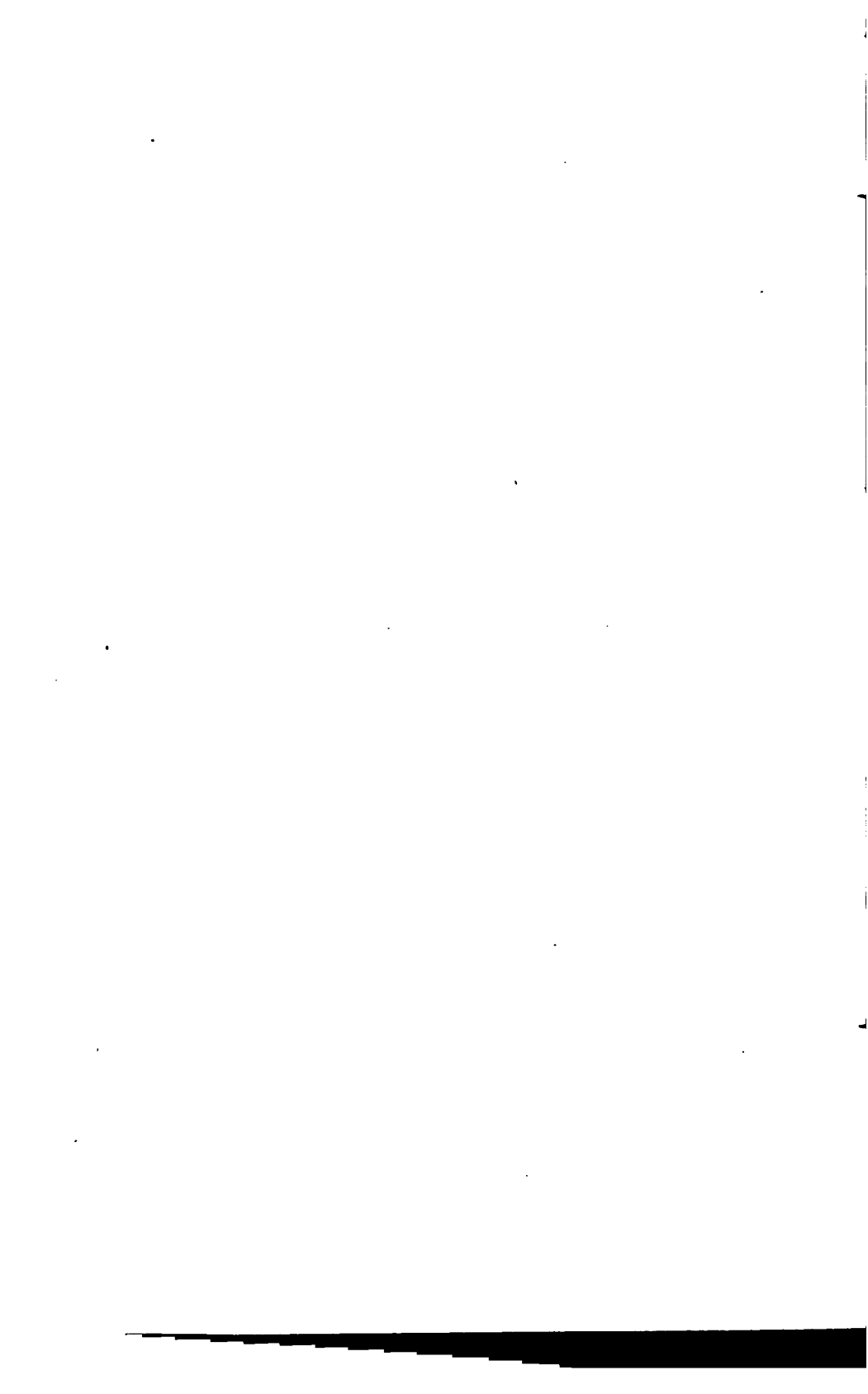
M. F. MORRIS for defendant.

By the Court:

The court below properly held that the filing of the bill in equity, taken with the interviews previously had between the parties and their attorneys, was a sufficient demand. But even if that were doubtful, we are of opinion that no proof of a demand was necessary. The original practice in detinue was to issue a *præcipe* commanding the delivery of the property to the plaintiff, after which the summons was issued, hence, as the serving of the *præcipe* was of itself a demand, no proof of a demand *in pais* was required on the trial. But, now in many jurisdictions, including this, the issuing of the *præcipe* has been dispensed with, and the suit is commenced by summons, although the rule of evidence as to proof of a demand *in pais* remains the same. So that practically the serving of the summons, has with us come to be regarded as a sufficient demand.

It is contended, however, that if this action may be brought without a previous demand, then, as it might have been brought the very next day after the bailment, the Statute of Limitations must begin to run from that day, and, inasmuch, as more than three years had elapsed be-

fore the institution of suit, the action is barred. settled rule governing the application of the Limitations is that it does not begin to run until an adverse claim on the part of the defendant. A rule to the case of one who receives a deposit and avers that his original possession is not adverse, so long as it remains so the statute will run in his favor. It is only from the time he sets up an adverse claim to the property that the statute is put in motion and begins to run. As the plea of limitation is the only question in the case, we affirm the



# INDEX.

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ACCOUNT. See *Statute of Limitations*, 2, 3; *Referees*, 4.

ACTIONS, LIMITATION OF. See *Statute of Limitations*.

ACTS OF CONGRESS. See *Statutes*.

ACTS OF LEGISLATIVE ASSEMBLY. See *Statutes*.

ACTS OF MARYLAND. See *Statutes*.

ADMINISTRATORS. See *Executors and Administrators*.

ADMISSIONS. See *Statute of Limitations*, 2.

1. Verbal admissions ought to be received with great circumspection consisting as it does in the mere repetition of statements, is subject to much imperfection and misapprehension, either being misinformed, or not having clearness of his own meaning, or the witness having misunderstood frequently happens also that the witness, by unintentionally using a few expressions really used, gives an effect entirely at variance with what the party intended. *So held* in a case where the court, citing the above *Ev.*, § 200, refused to disturb a written contract of admissions casually made in a conversation held before the date of the witness' testimony. *Hewitt v. Hewitt*.
2. Counsel for defendant, in his address to the jury, under the instructions of the court previously given, the question for the jury to consider was that of damages excepted to the charge of the court on the ground that it confined the jury to that question. *Held*, that it was not for him, in the face of his formal admission of the cause, to take exception to the charge of the court in limiting the mind of the jury to that which he was representative of the defendant, admitted was the proper matter for their consideration. *McGill v. The District*.

ADVERSE POSSESSION. See *Ejectment*, 2.

AFFIDAVIT OF DEFENCE.

An affidavit of defence under the 73d rule is insufficient if it amounts to no more than a change in terms of the defence, or does not state any specific defence or give any specific basis to the plaintiff of what the defendant means to rely upon in the defence of defeating the claim. *Connick v. Morrison*, 4

AGENCY. See *Railroad Companies*, 2; *Official Acts*, 1; *Real Estate Agents' Taxation*, 4.

APPEAL BOND. See *Pleading*, 1.

ARBITRATION. See *Referees*.

ASSIGNMENT. See *Evidence*, 6.

1. It is not in the power of a creditor to divide up his claim without the consent of the debtor, and apportion it out so as to give each of the assignees a right to sue him. If the latter chooses he may disregard all such partial assignments and pay the money to the original creditor. *Granite Company v. Chandler*, 32.
2. A present executed assignment of part of a claim bears interest if the claim also bears interest, but it is otherwise where the assignment is intended to be executory only. *Id.*
3. A party in making an assignment has a right to prefer creditors. *Barnard v. Insurance Co.*, 63.

ATTACHMENT.

1. Where property has been attached under a writ of attachment regularly issued on the ground that the defendant evades the service of ordinary process, judgment of condemnation should be rendered, although it appear that service of process was afterwards obtained on the same day, unless the defendant obtain an order quashing the writ, or supersede it with surety as provided by the statute. R. S. D. C., §§ 782-786. *Giddings v. Squier*, 49.
2. In the District of Columbia stock in an incorporated company cannot be subjected to the process of attachment or of execution. *Barnard v. Insurance Co.*, 63.
3. Justices of the Peace in the District of Columbia have jurisdiction to issue attachments for rent under the provisions of sec. 679 R. S. D. C. *Gross v. Goldsmith*, 126.
4. Where an attachment is issued for rent, part of which is due and part not due, and there is no averment, as required by the statute, in the affidavit upon which the attachment was issued, that the tenant was about to remove the goods, &c., the attachment will be void as to the rent not due, but will be allowed to stand as to the rest. *Id.*

AWARD. See *Referees*.

BAIL. See *Practice*, 1.

BAILMENT. See *Statute of Limitations*.

BILLS AND NOTES.

1. While it is perfectly competent for the holder of commercial paper to rest, in the first instance, upon the proof of the signature of the party to be charged, as in the case of the last endorser, yet when the defendant in such a case offers to prove that there was fraud or illegality in the transaction, such proof is admissible,

## INDEX.

### BILLS AND NOTES (*continued*).

and when admitted it changes the burden of proof upon the plaintiff the further obligation of accommodation in which he obtained the paper and of showing *bona fide* and for value received. *Bank v. Hume*, 90

2. In a suit against a partnership firm as endorsers upon a note signed individually by one member of the firm by him, first with the name of one of the members and then with the firm name (which endorsements are alleged to be fraudulent), it is competent for the plaintiff to show that the note had never been the note of the firm; that no value had been received for it by the parties subsequent to the drawer; that the note was not counted by the drawer at the bank (the plaintiff's benefit, and was treated throughout by the bank as his own property. And such proof should go to the appropriate instructions from the court in order to determine from all the facts and circumstances of the case whether the accommodation was made for the benefit of the firm or for the benefit of the drawer. And if the jury should find (it is the exclusive province) that the accommodation was made in his individual capacity, and that the name of the firm was there as an accommodation endorser, then before the plaintiff can recover it would be necessary for it to establish that the drawer had authority so to use the name of the firm.
3. It is not enough, however, that the defendants show that the plaintiff had reason to believe that there existed these facts in relation to the note. They must show knowledge on the part of the plaintiff but this knowledge the jury may infer from the facts.

### BILLS OF EXCEPTION.

Every bill of exceptions must be complete, either by stating the facts on which it is founded, or by referring to some case or cases which distinctly enumerates them. *Co. v. Co.*, 146.

**BONA FIDE PURCHASER.** See *Ejectment*, 3.

**BOUNDARIES IN DEEDS.** See *Deeds*, 1.

### BUILDING ASSOCIATIONS.

Where the constitution of a building association requires the holders to pay their dues upon their stock at regular meetings, payments not made at such meetings are not binding on the association in case of the embezzlement of the funds by the officer so receiving them. *Morrow v. James*,

**CAPIAS.** See *Practice*, 1.

### CHARACTER.

It is error to charge the jury that, if they have any reason to believe that the defendant is a person of bad character, they should find him guilty.



**CHARACTER** (*Continued.*)

about the guilt of the defendant or *any* doubt about his guilt, they may take into consideration evidence of his good character, as that is calculated to leave the jury with the impression that only in doubtful cases can evidence of good character be considered. Evidence of good character is the eye-glass through which the jury are to look at the whole case; it does not authorize them to overrule the truth or to disregard the force of other evidence, but it is to be considered and weighed with all the testimony in the case. *United States v. Hamilton*, 446.

**CHARGING THE JURY.**

1. It is error to charge the jury that the accused must have been in imminent peril of his life or of some great bodily harm, in order to support the defence of justifiable homicide, nor will the error be cured by the fact that the court, at the close of the charge, in a colloquy with counsel, assents to a suggested modification of its instruction on this point, when it does not appear that the jury's attention was directly called to the matter. *United States v. Hamilton*, 446.
2. Where a charge of great length is so delivered as to render it susceptible of different intendments in the minds of a jury, some of which may prove fatal to the accused, a new trial will be granted, although, taking the whole charge together, the law was stated correctly. *Id.*

**CHECKS OF BANKS.** See *Taxation*, 3, 4.

**CLAIMS AGAINST THE UNITED STATES.** See *Mandamus*, 1.

**CLOUD ON TITLE.** See *Taxation*, 5.

**COLLECTION OF TAXES.** See *Taxation*, 3, 4.

**COMPROMISES.** See *Contracts*, 2.

**CONDITIONS OF BONDS.** See *Real Estate Agents*, 2.

**CONFESSIONS.** See *Evidence*, 9, 10.

**CONFLICT OF LAWS.** See *Contracts*, 1, 2.

**CONSIDERATION OF CONTRACTS.**

When the question is by which of several systems or laws contract rights are to be determined, the rule is that whatever relates merely to the remedy and constitutes part of the procedure, is determined by the *lex fori*, but whatever goes to the substance of the obligation and affects the rights of the parties as growing out of the contract itself or inhering in it or attaching to it, is governed by the *lex loci contractus*. *Willard v. Wood*, 538.

**CONTRACT.** See *Conflict of Laws*; *Deeds*, 7; *Evidence*, 2, 4, 6; *Landlord and Tenant*; *Municipalities*; *Railroad Companies*, 3-8.

1. When the consideration is that the grantee shall provide a home for the grantor in the property conveyed, and the grantee after-

## INDEX.

### CONTRACT (*continued*).

- wards refuses to provide such home, a court of e the contract on the application of the grantor ar ties to their original *status*. *Diggins v. Doherty*,
2. It is a sufficient consideration to support an acti sory note that it was given in pursuance of a disputed claim. *Murket Company v. Steubner*, 30
  3. The obligation of the Government to protect t injuries by foreign states, and to procure indi case of such injuries, contains none of the ele known to the courts as contract, nor does such obtained by the State for the benefit of an injur at once the property of that citizen or property such a legal sense that his right may be enfor dles, *U. S., ex rel. Angarica de la Rua, v. Bayar*.

CONTRIBUTION. See *Subrogation*, 1.

### CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence applies on ligent act of the plaintiff is concurrent in point negligent act of the defendant so that the def opportunity to act with reference to the act of the no application to a case where the negligence of prior in point of time to that of the defendan the negligence of the plaintiff is not contributon ant's action should be controlled by the plain act of the latter was the result of carelessness c *Railroad Company*, 138.

### CORPORATIONS.

A testatrix bequeathed two hundred and eighty a gas light company in trust to pay the dividen nution of principal," to his daughter for life. " ing from its earnings doubled its original plant death of the testatrix, additional shares of stock increase in the capital; and these shares it d stockholders in proportion to the original stock The *cestui que trust* claimed these additional sh the ground that they represented the profits of original shares and were in effect dividends. *E*

1. A corporation has a right, within reasonable gr faith, to reserve and apply the profits to the inc and the stockholders hold their stock subject to
2. That certificates of stock are simply the represen est which the stockholder has in the capital of Before the issue, therefore, of this new stock held precisely the same interest in the increased capital that he held afterwards. The new shar

CORPORATIONS (*continued*).

representation of that interest, and not an increase of it. A dividend is something with which the corporation parts, but they parted with nothing in issuing this stock but an evidence of an ownership already existing. Being, therefore, in no sense, dividends, the duty of the trustee was to hold them, together with the original shares, for the benefit of the remainderman; paying only the dividends upon the whole to the life legatee. *Gibbons v. Mahon*, 130.

3. Under section 535 of the Revised Statutes of the District of Columbia, a recorded certificate of incorporation of a religious society is not evidence of a corporate organization unless it state the date of the election or appointment of the trustees; the length of time for which the trustees were elected or appointed; and is verified by an affidavit by one of the persons making the certificate. Without these particulars it is not the paper which the law provides for as sufficient proof of corporate organization, for if a paper be placed on record which is neither directed or authorized to be recorded, the record is no evidence of the existence or contents of such original paper, and still less of any facts set forth, recited or declared in such paper. *Baptist Church v. Railroad Company*, 43.

CRIMINAL LAW. See *Charging the Jury*; *Evidence*, 9, 10; *Insanity*, 1, 2.

DAMAGES. See *District of Columbia*; *Husband and Wife*, 1, 2; *Railroad Companies*.

1. A railroad draw-bridge was erected across the Potomac river by a railroad company under authority of an act of Congress. The statute provided that the company should keep the bridge and draw in efficient working condition at all times. A schooner passing through the draw of the bridge so injured it that it was immediately closed by the company and kept so for four days, during which time the repairs made necessary to the draw were prosecuted with all due diligence. By reason of the closing of the draw, a tug boat was detained and prevented from performing her regular business. *Held*, that she was entitled to recover damages for the detention. *Jones v. Railroad Company*, 106.
2. The law requires all areas in the city of Washington to be protected by iron or stone railing, with an allowance of four feet for an opening or entrance. The property in question had an area along its entire front, but it was protected by no railing of any sort. The plaintiff slipped and fell into the area, injuring himself seriously. On an action for damages it was *held* no defence that the plaintiff fell into the area at a point where the opening or entrance would have been, had a railing been erected. *McGill v. The District*, 70.

DEBTOR AND CREDITOR. See *Assignment*, 1, 2, 3; *Deed*, 2; *Execution*, 2, 3; *Fraudulent Conveyances*.

## INDEX.

DECLARATIONS. See *Evidence*, 8.

DEEDS. See *Evidence*, 6; *Estoppel*, 2.

1. Wherever in a deed there is a repugnant boundary enough in the other boundaries and residue of the deed to show a repugnancy, to correct it, and to ascertain the intention of the land, the court, out of the four cornered by the deed itself, will make the construction by rejecting the portion of the description or reconciling it with the intention so as to make the deed operative. *Shoemaker v. Nichols*, 100.
2. A creditor having notice of a deed which contains provisions of correction cannot put himself upon the deed without notice of a title not recorded.

DEEDS, COVENANTS IN. See *Vendor and Vendee*, 1.

DEEDS OF TRUST. See *Mortgages*, 1; *Estoppel*, 1.

DEEDS, RECITALS IN. See *Estoppel*, 2.

DEMURRERS. See *Pleading*, 1.

DETINUE. See *Statute of Limitations*.

DISCOVERY. See *Taxation*, 6.

Where the foundation is laid for a discovery in aid of a bill in equity will not only grant the discovery, but will also upon the discovery to administer relief. *McCormick v. The District*, 396.

DISTRICT OF COLUMBIA. See *License*, 1; *Railroad Taxation*, 1, 2; *Telegraph Companies*.

1. Since the decision of the Supreme Court of the United States, *The District*, 91 U. S., 540, the liability of the District for the accident, happening by reason of any neglect of control, management, custody and care of the street, has been an open question in this court. Nor have the motions have been made in respect of the administration of the mode of collecting taxes, at all changed the liability established by that case. *McGill v. The District*.
2. The act of Congress of June 11, 1878, establishing a government for the District of Columbia, is to be regarded as an organic act intended to dispose of the whole question of government for this District. *Eckloff v. The District*, 57.

DIVIDENDS. See *Corporations*, 2.

DIVORCE.

Where the cause complained of as a ground for divorce is in this District, and the party complained against is a resident of this District, the court has jurisdiction to grant a divorce although the plaintiff is a non-resident. *Smith v. Smith*, 255.

## EJECTMENT.

1. Where the landlord lets the tenant into possession, and the tenant afterwards surrenders the property to a stranger, the latter, on ejectment brought by the landlord, can only defend by showing title in himself. *Housam v. Kunecke*, 297.
2. In ejectment, adverse possession by the defendant and those under whom he claims will not avail to defeat the plaintiff's claim, if it be otherwise well founded, when it appears that the plaintiff, who was a remainderman, had no right of entry upon the property until after the death of the life tenant which occurred much less than twenty years before the institution of the action. *Thaw v. Ritchie*, 347.
3. Although a person in the possession of property may defend his title under a judgment of a court of competent jurisdiction, his defence will be disallowed if there was want of jurisdiction in the court to enter the decree under which he claims title, however innocently he may have purchased the property. *Id.*

ENDORSEMENT. See *Bills and Notes*; *Municipalities*, 2.

EQUITY. See *Discovery*; *Estoppel*; *Fraudulent Conveyance*; *Injunction*; *Mortgages*; *Taxation*, 5, 6, 8.

## ESTOPPEL.

1. In a suit in equity by the beneficiary of a trust, to enforce the trust and subject the land described in the trust deeds to sale for the payment of moneys loaned by him on such security, defendants, while admitting that the debt is still due and unpaid, cannot be heard to say that it has been satisfied by a prior sale of the property to complainant under a former suit to enforce the trust, and that he is now estopped to demand a second sale of the property, and at the same time aver that such prior sale was a nullity and was so decreed on a suit brought to set aside such sale, and that, under such sale and annulment thereof by such decree, complainant took nothing. A defence which, in the same breath, asserts that complainant acquired no title under the first sale, and that, by virtue of that sale, he is estopped from selling again, is a defence which a court of equity cannot entertain. *Pepper v. Shepherd*, 269.
2. Where one is not a party to a deed and does not claim under it, he is not estopped by its recitals. *Thaw v. Ritchie*, 347.

EVIDENCE. See *Admissions*; *Bills and Notes*, 1, 2, 3; *Character*; *Fraud*, 1.

1. It is error to exclude from the jury parol evidence tending to show that for the express purpose of concealing the magnitude of the undertaking a blank was left in the contract, and was filled up without the consent of the party sought to be charged, so as to make the contract a larger one than the latter had in contemplation at the time of signing. *Cotharin v. Davis*, 146.

## INDEX.

### EVIDENCE (*continued*).

2. Evidence that the paper was in blank at the time of  
deceit tending to prove the above facts. *Id.*
3. The rule which forbids a resort to parol evidence to  
does not forbid such resort to *supply* omission  
blanks. *Id.*
4. In cases where fraud is the foundation of the action  
tute is of necessity given to questions of evidence  
any other class of cases, for it is often impossible  
what may or may not become evidence of fraud and  
future developments of the case may reflect upon  
expedient, and often necessary, that evidence not  
missible shall be allowed to go to the jury, subject  
of the court, in afterwards rejecting it or modifying  
instructions with reference to the particular circum-  
case. *Rich v. Henry*, 155.
5. An independent act or an independent declaration  
after the assignment, can be of no value, of course  
an unquestionably good assignment, and *per se*  
against it. But when those acts or declarations are  
made in connection with any privity of the assign-  
with a certain scheme of procedure for the purpose  
out, the court, by appropriate instructions guiding  
the jury in the application of these subsequent  
acts, may properly submit them to the jury to re-  
antecedent intent. *Id.*
6. It is entirely competent to show a consideration dif-  
expressed in the deed when it is of the same gen-  
Thus, when the consideration stated is money, with  
consideration, the consideration of having a home  
conveyed, being of the same character, may be  
testimony to have been the true consideration. *L*  
172.
7. A prayer not founded upon any evidence in the case  
fused. *United States v. Lee*, 489.
8. A declaration accompanying and explanatory of  
in itself is always admissible as part of the *res ge-*  
the murdered man, when last seen alone, had been  
he was going, and replied "To look for N." (th-  
with the murder), it was *held* that this statement  
the rule against hearsay. *United States v. Nard*  
9. In the absence of any specific threat or promise  
whether evidence of a confession is admissible is  
a very large degree to the judgment and discre-  
who presides at the trial. *Id.*
10. The circumstances under which three confessions  
the accused at different times during the day co-

**EVIDENCE** (*continued*).

mented on by the court and the ruling of the court below in excluding the first and admitting the others approved. *Id.*

**EXECUTORS AND ADMINISTRATORS.** See *Orphans' Court*, 2; *Statute of Limitations*, 4; *Trustees*.

When an executor, who is also a guardian, has no further use for assets as executor, he will be treated as holding them as guardian, whether he has settled his account or not; no particular form, such as endorsement from himself as executor to himself as guardian, is necessary to effect a transfer, that being done by the law. *U. S., use of Lang, v. May*, 4.

**EXECUTION.** See *Attachment*.

1. Execution may issue on a judgment of this court at any time before the expiration of twelve years from the date of the return of the last execution. *Horsev v. Beveridge*, 289.
2. An agreement between the judgment creditor and the judgment debtor that the latter will withdraw all opposition or interference with an execution sale of the debtor's property, on condition that the judgment creditor will surrender certain of the debtor's notes when he, the creditor, had purchased the property at the sale, renders such sale fraudulent against the creditors of the debtor. *Id.*
3. But where a subsequent partition sale of the property is had, the fraud will not impair the title of the purchaser under that sale, but the proceeds being in the hands of trustees appointed by the court, may be followed by the creditors. *Id.*

**EXTRA COMPENSATION.** See *United States Officers*.

**FRAUD.** See *Execution*, 2, 3; *Evidence*, 5; *Fraudulent Conveyance*, 1.

Where a court of equity is asked to set aside a deed on the ground of fraud, and the answer denies all fraud and avers a valuable consideration to have been paid for the property, and in addition the witnesses relied upon by the complainant also deny the alleged fraud, the bill will be dismissed, although there be many circumstances of suspicion surrounding the transaction, for fraud must be proved; the court cannot, in the face of the rule that fraud is odious and not to be presumed, supply the deficiency of proof by presumption. *Quill v. Wolfe*, 188.

**GOOD CHARACTER.** See *Character*.

**GUARDIAN AND WARD.** See *Executors and Administrators*, 1.

**FRAUDULENT CONVEYANCES.**

Where a deceased debtor has left no personal estate, his simple contract creditor need not first put his claim into a judgment against the administrator in order to support a bill to set aside an alleged fraudulent conveyance of realty, made by the debtor during his lifetime, which the creditor seeks to subject to the satisfaction of his claim. *Dunn v. Murt*, 239.

## INDEX.

**FRIVOLOUS DEMURRERS.** See *Pleading*, 1.

**HABEAS CORPUS.** See *Practice*, 1.

1. An order directed by the Secretary of the Navy to commanding him to confine himself within certain such a restraint of personal liberty as will be read of *habeas corpus*; the party is not under restraint, as he chooses to obey the order. *In re Wales*, 38.
2. In a *habeas corpus* proceeding the power of the court the validity of an order of arrest is incidental to the lawfulness of an actual imprisonment; if the imprisonment it has no power to examine into the order. *Id.*

**HOMICIDE, JUSTIFIABLE.** See *Charging the Jury*, 1.

**HUSBAND AND WIFE.** See *Trust*, 3.

1. In a joint action by husband and wife for injuries to wife, recovery cannot be had for the loss of the wife the husband; nor for the loss of the wife's societal expenses of her cure, nor for attendance while she long to the husband alone. *Scott v. Railroad Comp.*
2. Hence an unqualified instruction which substantiated jury to give damages for injuries to the physical wife which disabled her from performing her necessary business, will be erroneous, when it appears that the allowed to take into consideration testimony as to ability to pursue her business, the earnings of which long to the husband. *Id.*

**INDIAN LANDS.**

Sections 2117 and 2118 of the Revised Statutes of the United States do not prohibit any person from entering upon Indian lands for grazing purposes only, if it be by lease or license from the Indians. *Pike v. Hunter*

**INFANT'S REALTY, SALE OF.** See *Orphans' Court*

1. The equity side of this court has jurisdiction under the act of 1785 to confirm a contract made by a guardian of an infant's realty where, under a bill filed for proof has been taken showing that the proposed sale for the advantage both of the infant and others interested in the land. *Meads v. Hartley*, 391.
2. When filed, such a bill may be amended, after answer proof taken, by adding parties and a prayer for judgment by a sale and division of the proceeds. *Id.*

**INJUNCTION.**

On an application for injunctive relief against an act or omission a nuisance growing out of the exercise of a right of legislature, a court of chancery will consider all



INJUNCTION (*continued*).

ces and equities of the case, and where, as a consequence of its interference, the hardship upon one side would be immeasurably greater than the injuries sustained by the other it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law. *Hewitt v. Telegraph Company*, 426.

INNOCENT PURCHASER. See *Ejectment*, 3.

## INSANITY.

1. The barbarous manner in which a homicide was committed does not of itself furnish any basis for the defence of insanity. *United States v. Lee*.
2. An instruction to the jury which rests upon the idea that there is a grade of insanity not sufficient to acquit a party of manslaughter, and yet sufficient to acquit him of murder, should be refused; the court does not recognize such a distinction in the forms of insanity. *Id.*

INSTRUCTIONS TO JURY. See *Charging the Jury*.

INSURANCE. See *Life Insurance*.

INTEREST. See *Assignment*, 2.

INTERPRETATION OF STATUTES. See *Statutes, Interpretation of*.

JUDGMENTS. See *Execution*, 1; *Fraudulent Conveyances; Practice*, 2, 3, 4.

1. When a reviewing court has positively determined that judgments in a certain direction are nullities for want of jurisdiction in the court that rendered them, their number is unimportant; no accumulation of usurpations can establish jurisdiction in the entire series if it does not exist in each individual case. *Thaw v. Ritchie*, 347.
2. A judgment founded in tort bears interest in the District of Columbia from the date of rendition. *Hellen v. Railroad Company*, 519.

JURISDICTION. See *Attachment*, 3; *Divorce; Ejectment; Infants' Realty. Sale of*, 1; *Judgments; Obiter Dicta; Orphans' Court*, 1; *Prohibition, Writ of*.

## JURORS.

1. On a motion for a new trial it is no ground of objection to a person as a juror that the law exempts him from jury service; he is not disqualified thereby, and, it being a personal privilege, he may waive it. *United States v. Lee*, 489.
2. Section 812 of the Revised Statutes of the United States which disqualifies any person from serving as a juror more than once in two years, does not apply to the courts of the District of Columbia. The provision upon that subject governing this District is

## INDEX.

### JURORS (*continued*).

to be found in section 861 (as amended) of the Re the District of Columbia, and by that section on elapse. *United States v. Nardello*, 503.

8. A person summoned as a juror for the criminal co his home is in Virginia; that his parents live th turned there when out of employment elsewhere there; that for the past fifteen years he has be vacations (about two weeks in the summer of home there; that, excepting said two weeks in e resided in Washington, D. C., during all that tim the V. M. R. Co., a Virginia corporation. That l here is as agent for said corporation; that he he married, and that he has no present intention of ploy of said company and returning to Virginia.

*Held*, A competent juror within the provisions of se R. S. D. C., which requires jurors to be resident: *Id*.

JUSTICES OF THE PEACE. See *Attachment*, 2.

JUSTIFIABLE HOMICIDE. See *Charging the Jury*.

LANDLORD AND TENANT. See *Attachment*, 3; *E*  
In the letting of a house (whether furnished or unfu no implied contract or condition that it shall be h. *v. Lighthall*, 82.

LEGAL REPRESENTATIVES. See *Executors and A*.

LICENSE. See *Real Estate Agents*, 1, 2.

The license law of the District of Columbia provide dealers shall pay annually \$25, and every person is to buy and sell produce, fish, meats, and fru and carts shall be regarded as a produce dealer, fication, "That no additional license shall be re duce dealers for selling meat." *Held*, That with the statute, one who brings butter and eggs to ve is as much a produce dealer as if he were bringing fruits, or what is ordinarily called "garden stuff" who sells meat only is not, within the statute, s *The District v. Oyster*, 285.

LIENS. See *Mortgages*, 3.

LIFE ESTATES. See *Wills*, 1.

LIFE INSURANCE. See *Insurance; Trust*, 3.

LIMITATION OF ACTIONS. See *Statute of Limitat*

MALICIOUS PROSECUTION.

1. A preliminary examination and discharge of the amining magistrate is such an ending of the p

## MALICIOUS PROSECUTION (*continued.*)

- support an action for malicious prosecution, although the accused was afterward indicted by the grand jury for the same alleged offence after the bringing of the civil action. *Costello v. Knight*, 65.
2. After his examination and discharge by the Police Court the accused brought a civil action against the prosecutor to recover damages for malicious prosecution. Pending that action the grand jury indicted the accused for the same alleged offence, and on trial he was acquitted. The civil action then coming on for trial, the plaintiff, against the objection of the defendant, offered in evidence the record of the indictment and acquittal which was admitted by the court. *Held*, Error, because there was no evidence that the defendant had promoted or originated the proceeding by indictment. Had that been shown it would have been admissible for the purpose of proving malice. The fact that his name was on the back of the indictment was not of itself any proof of malice. *Id.*
  3. On a trial for malicious prosecution the indictment is *res inter alios* so far as concerns the matter of fact which it goes to establish. It is evidence of the fact of a prosecution and of the fact of an acquittal, but as between the plaintiff and the defendant it does not determine the guilt or innocence of the accused. *Id.*
  4. It is for the jury to determine the facts, but it is for the court to say whether those facts constitute want of probable cause. *Id.*
  5. It seems, per James, J., that the discharge by the examining magistrate is *prima facie* evidence of want of probable cause. *Id.*

## MANDAMUS.

1. Mandamus will not lie against an officer of the Treasury Department who refuses to allow and pay a claim against the United States; for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States. *State of Mississippi v. Durham*, 235.
2. The necessary ground of an application for the writ of mandamus against an executive officer of the United States is, that it shall appear that he has been charged by law with the performance of a specific official duty, to which the petitioner is entitled, and that he refuses to perform that duty. *U. S., ex rel. Angarica de la Rua, v. Bayard*, 310.
3. Whatever may be thought of the propriety of a particular direction of the President to the Secretary in respect to the business of his department, the latter simply complies with the law in obeying that direction, and mandamus will not lie to compel him to a contrary course. *Id.*
4. However plain may be the political obligation of this Government, or of its Executive, to account to the individual citizen for moneys received from a foreign government on account of injuries done

## INDEX.

### MALICIOUS PROSECUTION (*continued*).

to him, and for any increment on such moneys a citizen is not of such a nature that it can be a damus upon the Executive, nor does it seem that a remedy for its enforcement exists. *Id.*

MARSHAL. See *Process*.

MISTAKE. See *Set-off*, 1.

MORTGAGES. See *Estoppel*, 1.

1. Where there is a mortgage or deed of trust upon real estate, a court of equity to take possession through its rents and profits, and when this is done and the property is sold, the rents and profits, as well as the *corpus* of the property, to satisfy the claim of the creditor. But where the mortgage is not asked for, and the rents and profits of the mortgaged property are permitted to pass into the hands of the mortgagee, the mortgagee can never recover them back, even though the mortgagee is the beneficiary in the amount of the proceeds of the sale, and that it was the mortgagee's fault in not having pointed out the mortgage. In this respect a mortgage and a deed are precisely upon the same footing. *Keyser v. Hiltz*.
2. Subsequently to the execution of the deeds of trust of a complainant's debt, a deed was made to trustees to secure a loan for money loaned by her to the grantor of land on the same lot and a lot adjoining thereto, constituting a senior encumbrancer of such additional lot; with the fact that the buildings on the property in the deed made in favor of complainant extended over and were erected on such additional lot, constituting a complete encumbrancer thereon. *Held*, that the facts, that the property had been held in general ownership, and that the lots would be destructive of the value of both of them, in a case where a court of equity should order all the property sold together, reserving to the beneficiary of the deed the adjoining lot, such portion of the proceeds of the sale in proportion to the value of her interest in such property. *Pepper v. Shepherd*, 269.
3. Wherever property subjected to a lien has been brought into the domain of a court of equity and a receiver of the property appointed, whatever rents and profits the receiver collects in his hands will be dedicated along with the *corpus* of the property to the satisfaction of the lien after paying taxes, insurance and other burdens. *Id.*
4. A mortgage was executed in New York; the mortgage was presumed to be payable there since no other place was designated. *Willard v. Wood*, 538.

MORTGAGES (*continued*).

5. As by the law of New York an assignee of an equity of redemption by a deed which he accepts, containing a covenant on his part to assume and pay the mortgage debt, but which deed is not sealed nor signed by him, nor intended so to be, is liable to suit for the debt by the mortgagee, he must likewise be held liable here; but the questions as to the form of the action, the time within which it must be brought, as well as the dignity or grade of the contract, *i. e.*, whether a specialty or in parol, must be decided by the law of this forum. *Id.*
6. At common law, and it is so in this District, the acceptance of such a deed creates no specialty obligation on the part of the grantee, although he may be held liable on it in assumpsit as on a simple contract. *Id.*
7. When the administrator of the mortgagee in such a deed brings suit upon it in this District to recover from the grantee's executrix a portion of the mortgage debt remaining unpaid after the foreclosure of the mortgage, the action must be in assumpsit, and the Statute of Limitations in force here is a bar if the suit be brought more than three years after the cause of action accrued. *Id.*

MUNICIPALITIES. See *Taxation*.

- I. The promises of any or all of the members of a municipal board, made by them as individuals at different times and places and without that joint official deliberation which the law requires, are not binding upon the municipality. *Strong v. The District*, 242.
2. Where the payee of municipal certificates of indebtedness has delivered them to third parties endorsed in blank, it becomes the payee's duty to inform the makers of any facts on which he, the payee, might object to the redemption of the certificates in favor of the holder, and claim payment to himself. In the absence of such notice the endorsement in blank and possession by the transferee give him apparent ownership and justify the makers in making payment to him. *Id.*
3. Ordinances enacted by a municipality, under its implied power to enact such, must be reasonable; but where its power over a given subject is derived from an express legislative grant, the court can only construe the extent of the grant; it has nothing to do with the reasonableness of an ordinance enacted by virtue of it. *The District v. Waggaman*, 328.

NEGLIGENCE. See *Contributory Negligence*.NEW TRIAL. See *Charging the Jury*, 1, 2; *Character*.NOTES. See *Bills and Notes*.NOTICE. See *Deeds*, 2; *Municipalities*, 2.

## INDEX.

### NUISANCE.

1. A public nuisance cannot arise from the exercise of authority of law ; but if the grant be not exercised regard to the rights of the citizen a private nuisance. *Hewell v. Telegraph Co.*, 424.
2. Facts stated which the court does not consider make private nuisance as entitle the complainants to a telegraph company from erecting poles and thereon along a public street and in front of property. *Id.*

### OBITER DICTA.

When there is no jurisdiction it does not belong to the functions of a court to give an opinion upon a matter without the guidance of parties or tribunals, even when they do not and invite such an opinion. *State of Mississippi v. Smith*, 339.

### OFFICIAL ACTS.

The doctrine which expands an agency by reason of the dealings of the parties has no application what to the official acts of a public officer. Whoever deals with a public officer with knowledge of the law limiting his power is bound by it. *District*, 339.

### ORDINANCES. See *Municipalities*, 3.

### ORPHANS' COURT.

1. The Orphans' Court of the District of Columbia has authority to decree the sale of an infant's real estate. *The Orphans' Court*, 52.
2. The Orphans' Court has full power. authority to examine, hear and decree upon a credit claim against an executor in the settlement of his accounts for an account of his against the deceased. *Mercer v. Hogan*, 52.
3. A decree or judgment of the Orphans' Court, in a case where the executor has the same force and effect as the decree of an executor in a contest *inter partes*. Where, therefore, exceptio in the executor's account have been heard and determined and no appeal is prosecuted, the account is res judicata and not be reopened by the equity court on a bill against the executor against the administrator for an account.

### PARAMOUNT TITLE, EVICTION BY. See *Venditor*, 3.

### PARTNERSHIP.

The moment the partnership ceases, the partner is no longer a partner in common of the partnership property. *Hewell v. Telegraph Co.*, 424.

### PATENTS.

1. The claim of a specific device or combination in a patent is an omission to claim other devices or combinations. The claim, in law, a dedication to the public of the invention. *Hill v. Commissioner of Patents*, 266.

PATENTS (*continued*).

2. When such omission arose from inadvertence, accident or mistake, the appropriate remedy is by re-issue; and a second patent may not be granted for the devices or combinations so omitted. *Id.*
3. The invention set forth in re-issued letters-patent granted to John J. Schillinger May 2, 1871, for an improved concrete pavement considered, and the claim held to be confined to "the arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose described." *Schillinger v. Cranford*, 450.
4. In this patent the "equivalent" of the tar paper must be held to mean some flexible or manageable substance, but the use of sand and cement for filling the interstices between the separate blocks is not such equivalent. *Id.*
5. The method adopted by the defendants in laying artificial stone pavements was as follows: He prepares, first, the bed of the pavement, and then places parallel strips of plank diagonally across it. He then fills the first space or subdivision with a mass of concrete and broken stone or similar substance, and repeats this process with the third and other alternate subdivisions. Then a large iron instrument called a cleaver is driven through, or nearly through, the concrete mass so as to mark off these subdivisions into blocks. After that is done, a different substance, *not concrete*, but composed of cement and sand, moistened and reduced to plastic form, is spread over the concrete and rubbed into the gaps formed by the cleaver. Then the whole is smoothed over and the top surface is cut through with a trowel exactly in a line with the cuts below. That is again smoothed over and what is called a "jointer" is run in the same lines which gives the pavement the appearance of separate blocks. The process is then repeated with the second, fourth and other alternate subdivisions until the whole pavement is completed. *Held*, not an infringement of Schillinger's patent. *Id.*
6. A charge of fraud in obtaining the reissue of a patent cannot be considered in a suit for an infringement of the reissued patent; but it is competent for the court to examine whether the reissue comprehends a new invention, and if it shall find such to be the case, to pronounce such new grant void. *Id.*
7. Where a patentee applies for a reissue under section 4916 of the Revised Statutes, and files a corrected specification containing new matter, but afterwards files a "disclaimer," as provided for by the next section, such disclaimer, if broad enough to withdraw every portion of the new claim, leaves in the reissue nothing but what was contended for in the first issue. *Id.*
8. If the disclaimer, however, is not in fact as comprehensive as it was intended to be, so that any part of the invention inheres in the reissue, then such part of the new matter is valueless and void, and must be discarded with the new invention. *Id.*

## INDEX.

### PATENTS (*continued*).

9. Only so far as the new invention can be fairly construed to explain and illustrate the first invention new claim, should it be looked to in examining scope of the old claim; but the matter so considered such explanations or illustrations as the patentee set forth originally in his application for the first patent omitted to do so "by inadvertence, accident without any fraudulent or deceptive intention."
10. The omission of one ingredient of a combination claim of a patent averts any charge of infringement claim. Every part of the combination claimed presumed to be material to the combination, and the contrary is admissible. *Id.*
11. So, where a patentee states in his specification that part of his invention is to be constructed of a material, and states or implies that he does not use other material as being suitable for the purpose, courts will not treat any other material as the one recommended by the patent. *Id.*

PAYMENT. See *Building Associations*, 1.

PAYMENT OF MONEY INTO COURT. See *Trust*

PLEADING. • See *Statute of Limitations*.

1. Where the undertaking in an appeal bond is absolute necessity in declaring on the bond for failure to appeal with effect, to aver that any request or demand upon the defendants to pay the damages and to murmur upon that ground is frivolous. *Atwood v.*
2. The object of a special traverse is to accompany the plaintiff's averment with an explanation of the denial that denial is based. *Pike v. Hunter*, 531.

### POLICEMEN.

The organic act of 1878 which gave to the Commissioner of the District of Columbia the general power of removal, repealed the provisions of the act of 1866 which provided for the removal from the police force of any person except on charges preferred against him. *Eckloff v. District*

POLITICAL RIGHTS. See *Contract*, 3.

PRACTICE. See *Affidavit of Defence*, 1; *Attachment*, 1; *Execution*, 1; *Fraudulent Conveyances*, 1;

1. Sections 794 and 795 of Revised Statutes of the District of Columbia, which enable a debtor arrested on a writ of *habeas corpus* and a jury trial of issues, to question the question of his right to be discharged, do



**PRACTICE** (*continued*).

that the debtor shall be admitted to bail, between the *habeas corpus* and the trial authorized to be had on the issues framed; and a recognizance taken on bringing the defendant into court on the *habeas corpus*, conditioned for his appearance at a future day for the trial of the issues, is void against the sureties. *Wallace v. Prott*, 259.

2. Where judgment is rendered by default for want of a plea the motion to strike it out may be granted under the 72d rule of court. *Meloy v. Grant*, 486.
3. But where the judgment is rendered for failure to comply with the 73d rule, the motion to vacate it must be under the 90th rule. *Id.*
4. An order vacating a judgment by default under the 72d rule is not appealable. *Id.*

**PREFERENCE OF CREDITORS.** See *Assignment*, 3.

**PRESIDENT OF THE UNITED STATES.** See *Mandamus*, 2; *Secretary of State*, 1.

**PRINCIPAL AND SURETY.** See *Practice*, 1; *Railroad Companies*, 8; *Subrogation*.

**PROCESS.** See *Attachment*, 1.

It is not necessary that the return upon a *fi. fa.* should be made prior to the return day; it may be made at any time after the marshal and his deputy have gone out of office. It is not error, therefore, for the court, on a trial in which the *fi. fa.* is relied on as a defence, to permit the ex-deputy to make a return upon the writ, although it be long after the return day. *Rich v. Henry*, 135.

**PRODUCE DEALERS.** See *License*, 1.

**PROHIBITION, WRIT OF.**

This court has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court martial. *Smith v. Whitney*, 535.

**PROMISSORY NOTES.** See *Bills and Notes*; *Contracts*, 2.

**PUBLIC OFFICIALS.** See *Official Acts*.

**PUBLIC NUISANCE.** See *Nuisance*, 1.

**QUIETING TITLE.**

Before a court of chancery will render its aid to quiet title to real estate, the plaintiff must have been in possession and the possession must have been threatened or assailed in some way, and if the title has been disputed it must have been vindicated by repeated actions at law: so if he seeks to have a cloud removed he must also have been in possession and the cloud must be with respect to something connected with his own title. *Marks v. Main*, 559.

## INDEX.

### RAILROAD COMPANIES. See *Damages*.

1. The employees of a railroad company constitute a train, and the passenger, from the moment he enters the train, is entitled to look to them for protection in cases of emergency or out of the disorderly conduct of another passenger. *Flannery v. Railroad Company*, 111.
2. When the agents of a railroad company are guilty of intentionally negligent conduct, so as to amount to a disregard of the rights of passengers, a jury may award exemplary damages; but the court will interfere where the damages are grossly excessive. *Id.*
3. By the charters of the Washington & Georgetown and Metropolitan street railroad companies they are required to keep their tracks, "for the space of two feet beyond the rails, and also the space between the tracks, at all times in good order." *Held*, that this language involves an obligation to construct a pavement where one did not exist on their roads. *The District v. Railroad Company*, 21.
4. The authorities of the District have the right to require the material of which this pavement shall be composed. If a pavement has already been constructed, they may remove it and a pavement of a different character.
5. Whenever the District authorities direct the grade or character of the pavement to be changed, it becomes the duty of the companies to conform their roads to the change.
6. And this obligation does not depend upon notice to the companies. It is incurred the moment they have knowledge that a change is begun or contemplated. *Id.*
7. The District, on the failure of the companies to do the work itself, and thereupon issued certificates for the cost thereof against the roads. These certificates were sold to third parties. *Held*, that the District had no action on such certificates, and the purchase of them by third parties gave the latter no right of action against the companies. The charge the liability of the companies to the District was that the District would be responsible to the purchasers for the cost paid for these certificates is a question which cannot be decided against the companies. *Id.*
8. The District is responsible for the condition of its roads. In this respect stands in the relation of surety for the companies. By the companies of their obligation to keep the roads in good condition; hence, on default being made, it may be removed and sue in *assumpsit* for the cost on the ground that the surety, who discharges the defaulted obligation, is entitled to be indemnified. *Id.*

## REAL ESTATE AGENTS.

1. The provisions of the act of assembly of August 23, 1871, as amended by the act of June 20, 1872, imposing a tax on the commissions of real estate agents and requiring semi-annual returns thereof, is not in excess of the power granted to the legislative assembly by the organic act of 1870; nor does the provision requiring the register, when, in his opinion, the returns are underestimated, to examine the books of the person making such returns, affect its validity, even if it be assumed that such provision is unauthorized. *The District v. Waggaman*, 321.
2. The bond required by the same act may be conditioned only upon the performance by the obligor of the duties required of him by law; and a bond with additional conditions extorted *colore officii*, by withholding a license to carry on the obligor's business until he executes it, cannot be enforced as to such additional conditions, although it will be valid as to the others. *Id.*

REASONABLE DOUBT. See *Character*.

RECEIVERS. See *Mortgages*, 1, 3.

RECORDS. See *Corporations*, 1.

RECITALS IN DEEDS. See *Estoppel*, 2.

## REFEREES.

1. Where a cause is referred to referees by stipulation of counsel, the provisions of the stipulation, in regard to objections which may be taken by the parties to the award, will control the court in examining the award. *Strong v. The District*, 53.
2. Where, by such a stipulation, it was provided that either party shall have thirty days after notice of the filing of the award, within which to file "motions as respects findings of fact, or rulings upon questions of law, or upon the admission or rejection of testimony as might have been made if the case had been tried by a jury and a verdict rendered": It was *held* that this language included all of the necessary or appropriate methods of reaching such errors of law, and therefore the method adopted by filing exceptions to the award was appropriate and sufficient if filed within the thirty days. *Id.*
3. Where, under a stipulation, referees return into court with their award, all the evidence and all their findings of law and of fact, the court may set aside the award for any patent mistakes of law or of fact appearing upon the face of the proceedings; but will observe the same hesitation to disturb the findings of fact as in the case of a motion for a new trial after verdict. *Strong v. The District*, 242.
4. Where the items in dispute between the parties to an account in an award of referees were numerous and the evidence voluminous, and the error of law in allowing certain classes of claims perme-

## INDEX.

### REFEREES (*continued*).

ated all the accounts, *held*, that even if the right cut down an award and adjust the final balance the court would not undertake to discharge the accountant by comparing all the items of complication and then stating the exact balance, but the entire be vacated. *Id.*

REMAINDERMAN. See *Ejectment*, 2.

REMEDIES. See *Contract*, 3.

RENT, ATTACHMENT FOR. See *Attachment*, 3, 4.

RENTS AND PROFITS. See *Mortgages*, 1.

RES GESTÆ. See *Evidence*, 8.

REVISED STATUTES. See *Statutes of the United States*

RIGHT OF ENTRY. See *Ejectment*, 2.

RULES OF INTERPRETATION. See *Statutes, Interpretation*

RULES OF COURT. See *Affidavit of Defence*; *Practice*

SECRETARY OF STATE. See *Mandamus*, 2; *Spanish mission*, 1, 2.

The Secretary of State of the United States is charged to conduct the business of his department in such manner as the President shall direct, and it must, therefore, be presumed that the action of the Secretary, in matters relating to the business of his department, has been directed by the President. *U. S., ex rel. Angarica de la Rúa, v. Bayard*,

### SET-OFFS.

1. When there is no allegation of mistake, money paid in satisfaction of one claim cannot be recovered by way of set-off upon another and different claim. *Market Co. v. Steel*

### SPANISH CLAIMS COMMISSION. See *Treaties*, 1.

1. Section 3659 of the Revised Statutes of the United States, relating to the investment of "funds held in trust for the United States," relates only to a class of trusts which were created or transferred with or disposed of by executive power without legislative sanction. This statute, therefore, has no application to the portions of the Spanish Claims Commission which were temporarily withheld from the claimants with a view to the payment of the commission, unless a payment to cover the same should be made by Spain. *U. S., ex rel. Angarica de la Rúa, v. Bayard*, 310.

2. The Secretary of State, by a circular letter to the President, informed the Spanish Claims Commission, informed the President that the centum of the awards would be reserved for the payment of the commission.

## INDEX.

### STATUTE OF LIMITATIONS (*continued*).

tion account, are not together sufficient to remove the Statute of Limitations, when pleaded by the defendant in a suit afterwards brought by the plaintiff upon the contract. *Company v. Beckley*, 163.

5. The Statute of Limitations does not begin to run against a bailee until he sets up an adverse claim in respect to the property. *Marr v. Kubel*, 577.

### STATUTES.

The following, among others, referred to, commented on, or cited in the cases indicated:

#### ACTS OF CONGRESS.

August 4, 1790. *Jackson v. Davis*, 194.  
May 2, 1797. *Do. do.*, 194.  
March 3, 1797. *Do. do.*, 194.  
March 2, 1799. *Do. do.*, 194.  
March 3, 1817. *State of Mississippi v. Durham*, 5.  
March 11, 1823. *Gross v. Goldsmith*, 126.  
January 9, 1837. *De la Rua v. Bayard*, 310.  
July 7, 1838. *Do. do.*, 310.  
Sept. 11, 1841. *Do. do.*; *Mississippi v. Do.*  
March 3, 1843. *Thaw v. Ritchie*, 347; *Meads v. Do.*  
March 3, 1863 (joint resolution). *Hewett v. Telegraph Co.*, 214.  
July 24, 1866. *Do. do.*  
June 20, 1874. *Strong v. The District*, 242.  
June 20, 1874. *United States v. Evans*, 281.  
July 12, 1876. *District v. Waggaman*, 328.  
June 19, 1878. *District v. Railroad Co.*, 214.  
June 27, 1879. *Do. do.* 214.

#### REVISED STATUTES U. S.

Sec. 202. *De la Rua v. Bayard*, 310.  
266. *State of Mississippi v. Durham*, 235.  
812. *United States v. Nardello*, 503.  
2116-2118. *U. S., use of Pike, v. Hunter*, 531.  
2596. *De la Rua v. Bayard*, 310.  
3659. *Do. do.* 310.  
4916. *Schillinger v. Cranford*, 450.  
4917. *Do. do.* 450.

#### REV. STATS. RELATING TO DIST. OF COL.

Section 555. *Baptist Church v. Railroad*, 43.  
677 to 679. *Gross v. Goldsmith*, 126.  
731 to 740. *Smith v. Smith*, 256.  
795. *Wallace v. Prott*, 259.  
861. *United States v. Nardello*, 503.  
875. *United States v. Lee*, 489.  
1019. *Gross v. Goldsmith*, 126.

## INDEX.

### TRUSTEES. See *Corporations*, 1; *Executors and Ad*

A trustee has always the right to come into court trust; and when he does so, and is thereupon on paying the funds into court, he cannot be subsequently occurring. *U. S., use of Lang, v*

### UNITED STATES OFFICERS.

The provision of United States Revised Statutes, forbids officers or employees of the United States fixed by law or regulations, from receiving a applies only to cases where the regular and the tions are given for the discharge of duties or r incompatible with each other. *United States v.*

### VENDOR AND VENDEE.

1. A vendor of real estate, selling in good faith, is the goodness of his title beyond the covenant where there has been no eviction by paramount refuse relief. The remedy of the vendee is a nants. *Smoot v. Coffin*, 407.
2. A voluntary surrender of possession is not equivalent by title paramount. *Id.*

### WASHINGTON & GEORGETOWN R. R. CO. : *panies*, 3.

### WASHINGTON MARKET COMPANY. See *Taza*

### WESTERN UNION TELEGRAPH COMPANY. *panies*.

### WILLS.

A will declared as follows: "Item. I give and beque wife, Eliza, all my property of every description, to hold and enjoy during her natural life equal benefit and maintenance of herself and Columbia, and of my son, Columbus." \* \* and bequeath to my two children above named their heirs, etc., all my estate, real and personal, to remain at and after the death of their mother, m *Held*, that the wife took a life estate only. 2

Ex. 51

